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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CABRIOLET PORSCHE + AUDI, INC.,
Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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CABRIOLET PORSCHE AUDI, INC., a Florida Corporation d/b/a Cabriolet Honda Car,
Plaintiff-Appellee, Cross-Appellant,

v.

AMERICAN HONDA MOTOR CO., INC.,
A California Corporation,
Defendant-Appellant, Cross-Appellee.

No. 84-5698

United States Court of Appeals,
Eleventh Circuit.

Oct. 15, 1985

Appeals from the United States District Court for the Southern District of Florida.

Before JAMES C. HILL and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

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*Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

JAMES C. HILL, Circuit Judge:

Appellant/defendant American Honda Motor Company, Inc. ("American Honda") appeals the district court's judgment that American Honda breached its contracts with appellee/plaintiff Cabriolet Porsche Audi, Inc. ("Cabriolet") and violated the federal Automobile Dealers' Day In Court Act and various Florida statutes regulating the activities of automobile distributors, importers, and manufacturers engaged in business in Florida. The district court awarded Cabriolet $4,706,645 damages. Both parties appeal the amount of damages.[1]

We reverse, holding that the district court's decisions that American Honda breached its contracts with Carbiolet and

1. American Honda argues the award is speculative and not supported by the evidence. Cabriolet argues that the damages awarded on account of American Honda's violations of the Florida statutues should have been trebled, pursuant to Fla. Statutes, § 320.697.

violated the Florida and federal statutes are based on clearly erroneous findings of fact and/or improperly drawn conclusions of law.[2] Judgment shall be entered in favor of American Honda. Since we dispose of this appeal on these grounds, we do not

2. It is clear that the district court judge adopted virtually verbatim the proposed findings of fact and conclusions of law tendered by appellee/defendant. Indeed, the appellee affirmatively stated in its brief to this court that it would not cite to the record because such references were adequately made in the district court's findings, which, we observe, counsel writing the brief had prepared. We do not approve of the practice of adopting verbatim the findings and legal conclusions submitted by one party to a litigation. Keystone Plastics, Inc. v. C & P Plastics, Inc., 506 F.2d 960, 962 (5th Cir. 1975). While the district court's adoption of the appellee's submissions may partially explain the court's misinterpretation of the evidence and, in some cases, the law, our judgment in this case is not based upon the court's engaging in this disapproved practice. Our judgment is based on our review of the court's findings and legal conclusions against the record and the case and statutory law, which reveals many of the relevant findings to be clearly erroneous and the legal conclusions to be incorrect.

reach the parties' attacks on the amount of damages awarded.

FACTS

The basic disagreement between American Honda and Cabriolet is quite simple to describe. Cabriolet, a Honda dealer which sold Honda cars, parts and accessories to the public from September 1979 to May 1980, and American Honda, the exclusive distributor of Honda products to dealers in the United States, disagree over the number of cars to which Cabriolet was entitled during the Spring of 1979 and onward, when, on account of the OPEC oil embargo and resulting oil crisis, demand for the small, fuel-efficient Honda car was high. Cabriolet claims it was entitled to all the cars it requested, or, at least, more than it received from American Honda. American Honda claims it sent Cabriolet all the cars to which it

was entitled under American Honda's allocation system. When Cabriolet pursued the matter in court, the district court agreed with Cabriolet's position.

While this outlines the basic dispute, it is not enough to "see the forest" in this case. Because we reverse the district court's decision primarily on the ground that many of the court's crucial factual findings are clearly erroneous, it is necessary to "see the trees" as well. We begin our more detailed examination of the relevant facts by identifying in greater detail the parties to this action.

The Parties. American Honda is a wholly owned subsidiary of the Japanese company Honda Motor Company, Limited. It is the exclusive importer and distributor of Honda automobiles throughout the United States, and receives all its cars from its Japanese parent.

Cabriolet is a Florida corporation with its principal place of business in Miami. Mr. Frank Diaz is Cabriolet's president and sole stockholder. At all times relevant to this case, Cabriolet was a dual, or non-exclusive, dealership, selling Porsches, Audis and Ferraris, in addition to Hondas.

The Cabriolet dealership was established in June of 1978 when Cabriolet agreed to purchase the assets of the De Maria Porsche-Audi-Honda-Ferrari dealership in Miami. The agreement included purchase of De Maria's Honda dealership, contingent upon American Honda's approval of Cabriolet as an authorized Honda dealer. Cabriolet filed an application with American Honda seeking such authorization. American Honda approved the application and provided Cabriolet with its standard dealership agreement, which

Cabriolet signed. Although the agreement is dated October 13, 1978, the evidence shows that Cabriolet commenced its Honda operations in mid-September 1978.

Cabriolet retained Mr. Frank Petrucci, who had been the general manager at De Maria, as the general manager at Cabriolet. Cabriolet also hired Mr. Snay, who had been De Maria's sales manager, as its sales manager.

Cabriolet's Operations during the Soft Period. During Cabriolet's first several months as a Honda dealer (fall '78 and winter '79), the market for Honda cars was "soft" (i.e. supply exceeded demand). During this period, Cabriolet was not an effective marketer of Honda cars. For example, between September and November, Cabriolet received 109 cars, but sold only forty-four. This marketing problem was, in large part, on account of Cabriolet's

policy to seek a high gross profit per car. Even though this was a "soft" period, Cabriolet refused to discount the cars below the manufacturer's suggested retail price. Honda representatives suggested that Cabriolet change its pricing policy and sell more cars. Cabriolet refused to do so.

At all times, Cabriolet had an inventory of Honda cars. However, in December of 1978, Cabriolet began to receive fewer cars than it did in its first few months of operation. For example, it did not receive any cars in December 1978 and January 1979.

The Hot Period. By Spring of 1979, demand for the fuel efficient Honda car had increased, primarily on account of the Arab oil embargo. Consequently, Cabriolet's sales record improved, with Cabriolet meeting nearly 100% of American

Honda's sales objectives for the dealership. Indeed, during this "hot" period, Cabriolet, and competing dealers, were preselling all their cars. Cabriolet requested cars from American Honda to meet its presell commitments and general sales expectations. While American Honda sent Cabriolet cars and Cabriolet at all times had an inventory, it did not send Cabriolet all the cars it requested. Thus, Cabriolet had to return deposits it had accepted, cancel contracts it had made, and refuse to accept contracts on a number of vehicles.

Throughout this hot period, Cabriolet complained to American Honda about American Honda's failure to send all the cars it requested. American Honda took the position then (and has done so throughout this litigation) that Cabriolet

was receiving all the cars to which it was entitled under American Honda's allocation system.

The Allocation System. Evidence introduced at trial indicates that American Honda had, at all times relevant to this lawsuit, an allocation system known as the "Day's Supply System." Under this system, dealerships are divided into a number of zones on the basis of geographical location. Each zone is given a certain number of the cars imported from Japan. The cars are then distributed within each zone by comparing all the dealers in the zone as to their rate of sales and their inventory for a given period, typically forty-four days immediately preceding an allocation. Then, through a mathematical formula, cars are allocated to the dealers so that each dealer will have approximately the same

number of day's supply of cars. In its brief, appellant provides the following description of the system, which is fully supported by the record:

The first element of the day's supply system is the dealer's sales rate. American Honda uses a set period of time immediately preceding an allocation to establish a sales rate. The precise period may have changed from time to time, but in general, it has been 44 business days. . . . Thus, if in the 44 business days immediately preceding an allocation a dealer has sold 44 cars, he has a travel rate of one. . . .

American Honda tracks a dealer's sales through his 'warranty cards.' For the dealer to receive credit for a sale of a car, he must send the warranty card for that car to American Honda. . . .

The next element of the day's supply system is a dealer's inventory. American Honda knows what it has shipped to a dealer and by the receipt of the warranty cards knows what the dealer has sold. This allows American Honda to determine the total number of cars available to the dealer for sale. . . . The total availability divided by the travel rate gives to American Honda each dealer's day's supply. . . . To maximize an allocation, it is necessary for a dealer, at the time an allocation is made, to minimize his inventory. . . .

To bring the dealers in a given zone up to the same day's supply, American Honda determines the total number of cars available for allocation and divides it by the travel rate for all the dealers involved. Thus, if there are a thousand cars available for allocation, and the

dealers in the involved area have been selling at a rate of 20 cars per day, the 'warehouse' or 'port' has a 50-day supply of cars. A dealer with a travel rate of one car per day and an inventory of 20 cars, i.e., a 20-day supply, will be entitled to 30 additional cars, i.e., the warehouse day's supply of 50 minus the dealer's day's supply of 20 multiplied by the dealer's travel rate.

As the above explanation of the system indicates, how many cars a dealer gets depends on how many cars it sells and how quickly it sells them. Also the system is a competitive one, pitting dealers in each zone against one another for their shares of the available cars. A dealer selling more cars faster than other dealers will get a higher percentage of cars in the future than will others in the zone. While the mathematical formula and other

details of the system are rather complicated, all a dealer need know to understand the system is that the more cars a dealer sells and the faster it sells them, the more cars that dealer will receive. For all practical purposes, that is the bottom line of the system.

The record indicates that American Honda explained to Cabriolet, when it complained about not receiving all the cars it requested, that the reason it did not get more cars (or all the cars it requested) during the "hot" period was that it had not sold enough cars, fast enough, during the "soft" period when its future allocation rate was being set. For example, Cabriolet's allocation rate for March and April, 1979, the beginning of the hot period, was based on its sales in the preceding forty-four days which included January and February when the mar-

ket was "soft" and Cabriolet was not selling many cars because of its pricing policy.

Fifteen Percent Holdback and Exclusive Facility. American Honda did inform Cabriolet that one way a dealer could obtain more cars was to provide an exclusive Honda sales facility. This offer of extra cars in return for an exclusive facility is another aspect of the Honda allocation system. Under the system, American Honda allocates to its dealers all the cars it expects to receive from a shipment from Japan, except fifteen percent. This fifteen percent "holdback" is used to: (1) replace cars damaged on the trip from Japan; (2) allocate to new dealers, which do not yet have sales rates upon which to base allocations; and (3) provide extra cars to dealers that establish exclusive Honda facilities.

Cabriolet would not establish an exclusive facility unless American Honda would guarantee to give Cabriolet a specific number of extra cars. American Honda would not so commit. No agreement was reached.

Sale of Cabriolet's Honda Dealership. On October 31, 1979, Cabriolet's dealership agreement with American Honda expired by its own terms. Although it was not renewed in writing, Honda continued to send cars to Cabriolet.

In 1980, Mr. Diaz sold Cabriolet's Honda dealership to Mr. Braman. Cabriolet continued to be a Porsche and Audi dealer.

This lawsuit. Cabriolet brought this suit against American Honda, claiming, essentially, that American Honda's failure to give it all the cars it requested amounted to breaches of the dealership agreement, and violations of state and

federal law. The district court agreed, based primarily on its conclusions that American Honda adopted an unreasonable allocation system and embarked upon a path designed to force Cabriolet to establish an exclusive facility of go out of business.

DISCUSSION

Specifically, the district court found that American Honda breached three agreements between itself and Cabriolet: (1) the dealership agreement; (2) the "Minimum Requirements, Planning Volume" document attached to the dealership agreement; and (3) an oral agreement to deliver sixty cars. The court also found that American Honda breached the federal Automobile Dealers' Day in Court Act and various Florida statutes.

The district court's findings of these breaches and violations are based, for the

most part, on two actions allegedly taken by American Honda. First, American Honda's adoption and implementation of its allocation system. Second, American Honda's efforts to encourage Cabriolet to establish an exclusive Honda facility. Thus, initially, we focus on these two actions on the part of American Honda, determining that neither action amounts to or involves any breach of contract or statutory violation. We then turn to consider those findings of breaches and violations based on other conduct, again concluding there were no breaches or statutory violations.

In reviewing the district court's decision on these matters, we are mindful of the scope of review. While we are free to review the trial court's legal conclusions de novo, we are bound by the trial court's factual findings unless they are

"clearly erroneous." The Supreme Court has recently elaborated on the meaning of this standard in Anderson v. City of Bessemer City, N.C., ___U.S. ___, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985):

> Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles ... is that 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous

> standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

In regard to findings based on determinations involving the credibility of witnesses, the Anderson court explained,

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge

can be aware of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is said. See Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See e.g., United States v. United States Gypsum Co., supra, 333 U.S. at 396, 68 S.Ct. at 542. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Cf. United States v. Aluminum Co. of America, 148 F.2d 416, 433 (CA2

1945); Orvis v. Higgins, supra [180 F.2d 537] at 539-540 [(CA2 1950)].

Anderson, 105 S.Ct. at 1512-13.

I. AMERICAN HONDA'S ALLOCATION SYSTEM

Initially, it is important to clarify what is and is not at issue in regard to American Honda's allocation system. First, whether American Honda in fact had an allocation system is not at issue. We note that in one of its findings the district court states that American Honda did not have an allocation system at any time relevant to this case. American Honda and Cabriolet spend much time arguing over the correctness of this finding. However, this finding is not at issue, since the district court never relied upon it in finding a breach of contract or a

statutory violation.[3] Indeed, the court based all such conclusions upon its other findings that there was a system, and the adoption, implementation and content of the system were not permitted under the dealership agreement.

Further, there is no real disagreement as to the content of American Honda's allocation system. Both parties agree

3. We note that, in any event, this finding is clearly erroneous. All the evidence indicated that American Honda had an allocation system at the time relevant to this case. Indeed, appellee Cabriolet conceded as much in its amended complaint. In paragraph ten of the amended complaint, Cabriolet states, "at all times pertinent hereto, AMERICAN HONDA operated a system wherein it allocated HONDA motor cars to its dealers throughout the United States." In paragraph eleven, Cabriolet states that American Honda's allocation system "was known as the 'Day's Supply System.'" Cabriolet is bound by admissions in its pleadings. Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983).

that the system is the day's supply system described in the "FACTS" section of this opinion.[4]

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4. Cabriolet essentially conceded as much in its amended complaint, stating,

> 10. At the time that CABRIOLET applied to AMERICAN HONDA for approval as a dealer and at all times pertinent hereto, AMERICAN HONDA operated a system wherein it allocated HONDA motor cars to its dealers throughout the United States.
>
> 11. The allocation system of AMERICAN HONDA during CABRIOLET's tenure as a Honda Dealer was known as the 'Day's Supply System.'
>
> 12. Through this system, AMERICAN HONDA purported to offer each Honda dealer a number of cars per month so that taking into account the cars that a dealer already had available to sell at the time of allocation, upon the allocation, each dealer would have a supply of cars available to it that would 'last' approximately the same number of days. The length of time each dealer's supply would 'last' was determined by each dealer's 'rate of sales,' i.e., the average number of cars sold by that dealer each day during a preceeding [sic] base allocation period.
>
> . . . .
>
> 14. Allocations under AMERICAN HONDA's Day's Supply System were not

Finally, there is no doubt that Cabriolet received every car to which it was entitled under the day's supply system. The trial court never found to the contrary,[5]

4. (Continued)
made by city or district, but, rather, by port zone, among all dealers who were served by a given port of entry. CABRIOLET was served at all times pertinent hereto by the Port of Jacksonville, Florida and allocations were made when cars were 'received' in port.

Counsel for Cabriolet has made bold statements, particularly at oral argument, that might at first glance suggest that Cabriolet does not agree on the matter of the content of the allocation system. However, a close examination of these statements and the specific arguments Cabriolet makes in this appeal reveals that it is claiming that the allocation system was not applied consistently and uniformly, and not that the content of the system was other than that described in this opinion.

5. It is interesting to note that while the district court never found that Cabriolet received even one car less than it was entitled to under the system, it did find that Cabriolet received more cars than it was entitled to. In its factual finding number 25, the court stated,

and Cabriolet has not raised the issue on appeal.[6]

What is at issue here is whether American Honda's allocation system--its content, adoption, or implementation--breached the dealership agreement. The district court found it breached Article VII, section 2, which provides,

> Dealer shall furnish its orders for Honda Automobiles and Honda Automobile Parts to Distributor on forms supplied by Distributor at such time or times and for such period or periods as Distributor reasonably may require from time

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5. (Continued)

> Had American Honda distributed cars during late 1978 pursuant to any purported method testified to by anyone at trial, Cabriolet would have received no more than 44 cars during October and November. No witness was able to explain why Cabriolet received . . . 78 cars during October and November, 1978.

6. We note that, in any event, Cabriolet has not been able to point this court to any evidence in the record that shows that Cabriolet did not receive all the cars to which it was entitled under American Honda's allocation system.

> to time, and all such orders may be accepted by Distributor in whole or as to any part thereof. All orders of Dealer shall be binding upon it unless and until they are rejected in writing by Distributor, provided, however, that in the event of a partial acceptance by Distributor, Dealer shall no longer be bound with respect to the parts of the order not accepted. In the event of shortage or restricted supply, Dealer gives Distributor the right to allocate such supply in any reasonable manner Distributor deems fit in any geographical market area.

(emphasis added). The court found that Honda breached this provision for three reasons: (1) it established an allocation system at a time of no shortage or restricted supply (Breach No. 1); (2) it then applied this unlawfully established allocation system to an actual shortage period and refused to modify or alter the allocation rate, thereby making American Honda's "manner of allocation" as applied to Cabriolet "unreasonable" (Breach No.

2); and (3) the system in general was not a reasonable method of allocation (Breach No. 3).

A. Breach No. 1: Establishment of Allocation Rate at Time of No Shortage or Restricted Supply

The district court's conclusion is based on a factual finding that is clearly erroneous. That finding is that the period between September 1978, when Cabriolet became a Honda dealer, and Spring 1979 was not a period of shortage or restricted supply. While the evidence may well support the finding regarding a shortage,[7] it does not with regard to restricted supply. The record shows that during this period American Honda could obtain only those cars its Japanese owner chose to send. American Honda's supply was

7. We do note, however, that Cabriolet conceded in paragraph 26 of its amended complaint that "[p]rior and subsequent to Fall, 1978, HONDA cars were in short supply. . . ."

not unlimited and must be considered "restricted."

Even if during the period prior to the spring of 1979 there were no shortage or restricted supply, nothing in the dealership agreement prohibits American Honda from adopting and implementing an allocation system in times of surplus or non-restricted supply. That the contract expressly authorizes adoption of an allocation system in times of shortage or restricted supply does not mean one is forbidden at all other times. Indeed, the agreement expressly grants Honda with discretion as to the allocation of cars, stating "Dealer shall furnish its orders for Honda Automobiles . . . to Distributor on forms supplied by Distributor at such time or times and for such period or periods as Distributor reasonably may require

from time to time, and all such orders may be accepted by Distributor in whole or as to any part thereof" (emphasis added).

B. Breach No. 2: Application of System to Shortage Period

The district court found, essentially, that it was unreasonable (and thus a contract breach) to base allocation to Cabriolet during the hot period on the sales and travel rates it established during the period of nonshortage. The court took the position that American Honda should have assisted Cabriolet during the hot period by modifying the allocation system and giving it additional cars.

We disagree. Given the nature of American Honda's allocation system, we find nothing unreasonable in basing Cabriolet's allocation rate for the hot period on the sales rate it established during the soft period. American Honda's

allocation system is a competitive one. Dealers in each zone are competing with each other for the limited number of cars sent from Japan. That an automobile distributor, naturally interested in selling as many cars as possible and encouraging its dealers to do so, should adopt such a competitive system is not unreasonable. Nor is it unreasonable that, under this competitive system, dealers that undertake to sell a maximum number of cars during a soft period are rewarded with more cars during the hot period than are dealers, like Cabriolet, that for their own reasons do not undertake to sell many cars. There may have been something unreasonable about this system had Cabriolet not known or been told that its failure to sell aggressively during the soft period would affect its allocation in the future. However, as

will be made clear in subsequent discussion, the record does not support such a finding here. See infra slip op. pages 245-246, pages ___- ___.

We also note that Cabriolet was not at any time a dealership in trouble. Cabriolet at all times made a profit on its Honda business. Further, Cabriolet at all times had an inventory. Thus, this is not a case where an otherwise reasonable, competitive system has led to the ruination of a dealership, thereby putting into question the reasonableness of the system in application.

C. Breach No. 3: System Unreasonable in General

The district court found that the allocation system, as applied in general, is not a reasonable method of allocation. The court gave five reasons for reaching this conclusion. Each of these reasons is

either irrelevant or based on clearly erroneous factual findings.

The court's first reason is that the allocation system was never disclosed to the dealers including Cabriolet. According to the court, Cabriolet was never advised of the fifteen percent holdback policy or that, if it did not sell cars, subsequent allocations would be diminished.

That Cabriolet may not have been told about the fifteen percent holdback is irrelevant. The relevant information, at least for purposes of this appeal, is information about how a dealer could obtain cars under the allocation system. Knowledge of the fifteen percent holdback policy is not necessary for that. What is necessary is knowledge that a dealer can obtain "extra" cars from American Honda (from the fifteen percent pool) if the

dealer is a new dealer or establishes an exclusive facility. The evidence shows, and Cabriolet concedes (indeed, asserts), that it was told by American Honda that it could obtain additional cars if it provided an exclusive facility. Thus, Cabriolet was knowledgeable of all it needed to know regarding the fifteen percent pool.

The district court's finding that the manner in which the other eighty-five percent of the cars were allocated was never disclosed to the dealers, including Cabriolet, is clearly erroneous. Representatives of every dealership, other that Cabriolet, who testified were aware of the allocation system and knew that under the system the more cars a dealer sells and the faster it sells them, the more cars the dealer receives.

Further, any finding that Cabriolet had not been told about and was not aware of the allocation system and its basic workings is not supported by the evidence. The district court relied on the testimony of three witnesses to reach this conclusion: Mr. Diaz; Mr. Petrucci, and Mr. Snay. Mr. Diaz, the president of Cabriolet, testified that he was not informed of, or otherwise aware of, the allocation system. However, the evidence shows that Mr. Diaz relied quite heavily on Mr. Petrucci, Cabriolet's general manager, to take care of allocation matters. Thus, it was not essential to the operation of Cabriolet that Mr. Diaz knew of the system, as long as Mr. Petrucci knew of it. Mr. Petrucci, who also had been the general manager at the De Maria dealership, and Mr. Kenneth Snay, who was De Maria's sales manager and then joined

Cabriolet as its sales manager, testified that they were never told of the allocation system during the time they worked for the De Maria dealership (pre-September 1978). They never testified that they were not told of the system during the time they worked for Cabriolet. The uncontradicted evidence indicates that they were informed of the system while at Cabriolet. Automobile Dealer Contact Reports, prepared by Mr. Wayne Ferens, American Honda's District Sales Manager for South Florida, indicate that twice in March of 1979 Mr. Ferens "reviewed the allocation system" with representatives from Cabriolet, and Mr. Snay in particular.

Further, documentary evidence indicates that Mr. Snay and Mr. Petrucci were informed of the allocation system long before March 1979; indeed, during the De

Maria dealership. Automobile Dealer Contact Reports, prepared by Mr. Ferens and his predecessor Mr. Finley, indicate that they had explained the basics of the allocation system (i.e., to get cars, a dealer must sell cars) to Mr. Petrucci in particular a number of times in 1977 and 1978.[8]

The testimony of Mr. Petrucci and Mr. Snay indicates they were well acquainted

8. These contact reports show, for example: (1) in March 1978, Mr. Finley "covered the facts of the most recent allocation" with Petrucci and "how [De Maria's] . . . current inventory situation affects them. . ."; (2) in May 1978, Mr. Ferens told Petrucci that his inventory had to be reduced "in order to increase T.R. [i.e. travel rate]"; (3) in June 1978, Mr. Ferens "reviewed allocation system with dealer personnel" and noted that De Maria's sales had been very slow and that it had "received no units from last allocation. Too slow in getting cards in"; (4) in July 1978, Mr. Ferens again reviewed De Maria's sales with Petrucci, noting that "Mr. Petrucci would like more units but travel rate is very low", and that Petrucci "stated that he felt the allocation system was fair and they were not doing the job."

with the workings of the system. While Mr. Petrucci did not know all the details of the system, he indicates in his testimony that he was aware that allotments were based on "how many cars are on a ship, . . . how many warranty cards you [the dealer] have sent into the office in New Jersey, how many cars you might have in inventory . . . ." Petrucci Deposition at 6. He testified, he was aware that it was important to send warranty cards in promptly "because they reflected your sales." Trial Record, vol. 10, at 241. Mr. Snay testified that, while at Cabriolet, Mr. Ferens had reminded him "how important it is to send in the warranty registrations, so when the cars do become available and they [i.e., American Honda] analyze it, the inventory of the dealer body, they [American Honda] would try to replenish the inventory." Id. at 327.

Mr. Snay also testified that he had talked to Mr. Ferens about Cabriolet's pricing policy, which had a negative effect on sales during the soft period, and that Mr. Ferens had suggested Cabriolet "[t]ake a little less profit and blow the cars out of there." Id. at 371.[9] In his deposition, Mr. Snay testified that he understood at the time (and now) that "blowing the cars out" would increase the number of cars Cabriolet would receive, stating "[i]f you blow X amount of units, you have the possibility of altering the amount of cars that would be returned to you or sold to you from American Honda." Snay Deposition at 44-45. See also Trial Record, vol. 10, at 372-73.

9. In his deposition, Mr. Snay indicated that Mr. Ferens may have made this comment in April or May of 1979, though he was not sure. All the other evidence in the record, including contemporaneous documents, indicate that Mr. Ferens made this comment in December 1978 or January 1979.

We find neither the documentary evidence nor the testimony of Petrucci, Snay, and Diaz to support the trial court's finding. To the extent portions of the testimony of Petrucci's, Snay and Diaz may indicate Cabriolet lacked knowledge of or was not told about the allocation system, we find their testimony to be so contradicted by documentary evidence (i.e., the contact reports), so internally inconsistent (i.e., Petrucci's and Snay's own testimony indicating their awareness of the system), and so implausible that a "reasonable factfinder would not credit it." For these reasons, the trial court's finding, resting as it does on any such testimony, is clearly erroneous. Anderson, 105 S.Ct. at 1512-13.

The court's second reason for finding the allocation system unreasonable is that the system was not written down. We find

this lack of a writing to be irrelevant, particularly since the evidence indicates that American Honda's allocation system was orally communicated to Cabriolet and that Cabriolet and other Honda dealers were aware of the system.

The third reason given by the court is that the system is incapable of being fully described in the same manner by any two witnesses. This is a mischaracterization of the evidence. The witnesses' descriptions may have differed as to some details regarding the system, but all testified that the thrust of the system was the more cars a dealer sells and the faster a dealer sells them, the more cars that dealer will receive.

The fourth reason given was that the system could be easily subverted by dealers who received inside information as to allocation and registered unsold cars as

sold. Though neither the district court nor Cabriolet point to any evidence in the record supporting this finding, it appears from our own review that there is some such evidence. However, there is also evidence that American Honda was taking reasonable steps to prevent and detect such subversion. The evidence reveals, for example, that Honda took steps to intensify its auditing of dealerships in certain regions to discover any false reporting of sales.[10] An allocation system

10. In this regard, American Honda sent the following letter, dated November 15, 1979, to Honda dealers in its eastern region:

> On April 16, 1979, you were informed by letter that some dealers were reporting an abnormally high number of demonstrators and sales to questionable leasing companies. We also outlined audit procedures that would be in effect.
>
> We are currently experiencing this same situation again and we would like to point out what action will be taken to correct the problem. Dealer's records will be audited by the District Managers.

is not unreasonable simply because it is possible to subvert it, as long as reasonable steps are taken to prevent and detect such subversion. The evidence indicates that American Honda took such steps.

10. (Continued)

> If a unit has been reported as sold to a leasing company, you will be asked for a copy of the 'bill of sale,' which in turn must be shown as posted in the dealership 'Vehicle Sales Journal.' Those units reported as demonstrators must be in use with mileage shown. Dealer inventory cards should reflect that unit is a demonstrator.
>
> In the event, we find sales and demonstrators reported that are not actually sold or in service, we will add the total numbers of these units to the next allocation which will increase the total availability for the dealership with a resultant decrease in the number of units allocated for the particular dealer involved.
>
> We regret that it is necessary to do this be we will not permit a few dealers to take advantage of the majority of our dealers who report sales on an accurate and timely basis.

Defendant's Exhibit EK, 79-3409.

The fifth reason given was that under the system distribution of the fifteen percent holdback was left to the whim and caprice of lower management personnel. This finding is clearly erroneous. The evidence shows that cars in the fifteen percent holdback pool were used for the following three purposes: (1) to replace cars damaged on the trip from Japan; (2) to establish an inventory for new dealerships, which do not yet have sales rates; and (3) to provide extra cars to dealers that establish exclusive facilities for Honda cars. The evidence shows that American Honda employees had to account for the cars distributed from the fifteen percent pool.

The trial court's sixth reason for finding the system "unreasonable" was that it was not uniformly applied, as certain dealers were favored. The district court

found, for example, that Honda South, one of Cabriolet's competitors, was not treated consistently with the "sell more/get more" allocation system, because "despite selling 100 cars fewer in 1978 than Honda South received from American Honda, that dealership still received almost triple the number of cars in 1979 that it received in 1978."[11] The court also pointed out that Mr. Braman, who purchased Cabriolet's Honda dealership, sold only 345 cars out of the 424 received in 1980, yet received 897 cars in 1981 and 1385 cars in 1982. Further, the court found that, had Honda distributed cars during later 1978 pursuant to its purported system, Cabriolet would have received no

11. In 1978, Honda South received 281 cars from American Honda and sold 188 of them during the year. In 1979, it received 690 cars from American Honda.

more than forty-four cars in October and November 1978, rather than the seventy-eight it received.

The record does not support the district court's finding that Honda's system was not uniformly applied. The record clearly indicates that, under American Honda's allocation system, one cannot determine from simply the number of cars a dealer sells in a given year, how many cars that dealer is entitled to receive the next year. Allocations are made on the basis of forty-four days periods, not years. Further, to determine the number of cars to be allocated, other factors have to be examined in addition to number of cars sold. These other factors include: (1) how many cars other dealers in the zone had sold during the relevant period and how quickly they had sold them; (2) how many cars were sent from Japan

during the relevant period; (3) whether the dealer provided an exclusive Honda facility; (4) whether the dealership was a new one. The trial judge did not remark on any of these factors. He looked only at the number of cars sold during a given year and the number received. Such evidence and reasoning are insufficient to sustain the trial court's finding that American Honda's allocation system was not uniformly applied.

Further, we do not find, and Cabriolet does not point to, any evidence in the record that would support the trial court's finding. Indeed, the evidence we do find in the record indicates that the cars were allocated in accordance with the allocation system. At trial, Mr. Esserman, owner of Honda South, explained that the reason he received so many cars in 1979 was that he sold substantially more

cars in 1979 than in 1978. He explained that he had just opened the dealership in 1978 and did not yet know the product very well. In 1979, his knowledge of the product increased and, consequently, his sales record improved. The record indicates that Mr. Braman had agreed to establish an exclusive facility. Under American Honda's allocation system, this entitled him to extra cars. In regard to Cabriolet, the evidence shows that it was a new, recently opened dealership in October and November 1978, and thus under the allocation system entitled to be provided cars without strick reference to any prior sales rate. Also, Cabriolet would have been entitled to receive credit for some of the sales made by the De Maria dealership. For, though Cabriolet did not sign the Honda dealership agreement until

October 13, 1978, it did start operating the De Maria dealership in September.

Finally, the court found that the allocation system was unreasonable because American Honda used the cars in fifteen percent holdback pool as "weapon[s] to coerce or attempt to coerce certain dealers like Cabriolet into making extra-contractual concessions." As is shown under heading "II" of this opinion, Honda never coerced Cabriolet to make any extra-contractual concessions. At the very most, the record shows that American Honda responded to Cabriolet's requests for more cars by suggesting that Cabriolet could obtain extra cars if it established an exclusive facility.

Nor does the record indicate that American Honda used the cars in the fifteen percent holdback pool to coerce any other Honda dealer. To support its

finding, the district court appears to rely primarily on evidence regarding the Friendly dealership, which was originally a Saab and Honda dealership and terminated the Saab dealership in 1980. Relying on the testimony of Friendly's vice president and general manager, Mr. Bower, the court states, "American Honda orally represented that additional cars would be given to Friendly if it got rid of Saab . . . and threatened Friendly that 'if it didn't get bigger it would get smaller.' Shortly thereafter, Saab was no longer located at the Friendly facility. . . ." This is a mischaracterization of the record. Mr. Bower testified that he was not forced to become an exclusive dealer, but chose to do so in 1980 because the Saab dealership was not profitable. The alleged threat about "getting smaller" was not made in connection with Friendly's terminating the

Saab dealership. The record indicates the statement was made in 1983, about three years after Friendly terminated the Saab dealership.

Having determined that the district court's characterizations of the allocation system as inconsistent, secretive, and coercive are clearly erroneous, we are left with a system under which allocations are based essentially on a dealer's sales record and under which a certain number of cars are reserved to replace damaged cars, to help supply new dealerships, and to encourage dealers to establish exclusive facilities for Honda cars. It may well be that left to our own devices we or the district court would have adopted a different system or modified this one. However, that is irrelevant. The sole question before us is whether the system American Honda

adopted is unreasonable. We find nothing "unreasonable" about this system. See, e.g., Cecil Corley Motor Co. v. General Motors Corp., 380 F.Supp. 819, 840 (M.D. Tenn. 1974).

II. EXCLUSIVE FACILITY

The district court found that American Honda decided internally that it did not want dual dealers in South Florida and embarked on a course of conduct designed to force dealers to become exclusive or sell out. In regard to Cabriolet, that conduct, according to the district court, consisted of imposing the following sanctions upon Cabriolet for refusing to establish an exclusive facility: (1) refusing to renew the dealership agreement; (2) refusing to lower Cabriolet's capitalization requirements; and (3) refusing to give Cabriolet extra cars from the fifteen

percent pool.[12] Based on these findings, the court found violations of state and federal statutes and breaches of the dealership agreement. The findings with regard to renewal of the dealership agreement and Cabriolet's capitalization requirements are clearly erroneous. We find nothing in the record, nor does Cabriolet direct us to any evidence, that indicates that any such actions were threatened or performed on account of Cabriolet's failure to build an exclusive facility.

The finding with regard to the extra cars is supported in part. The record indicates and all parties concede that

12. We observe that the trial court's findings could perhaps be interpreted as conditioning receipt of any cars at all on the building of the exclusive facility. Such a finding is not supported by the record and would be clearly erroneous. The record shows that building an exclusive facility was a condition only of receiving extra cars.

American Honda told Cabriolet that it could obtain additional cars if it established a facility exclusively for Honda cars. The offer was not made in any threatening or demanding manner. The district court viewed the offer as part of a scheme to force Cabriolet to become exclusive and determined the offer violated four contractual and statutory "good faith requirements": (1) the "good faith" requirement in Article III, section three of the dealership agreements; (2) the implied condition of cooperation in the dealership agreement; (3) the federal Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221, et seq.; and (4) Florida Statutes, section 320.64(6). It is the district court's conclusions that the offer was not made in good faith and was violative of the contract and statutory

provisions that are not supported by the record or case law.

A. Dealership Agreement

Article III, section 3 provides,

> If during the term of this Agreement, expansion of Dealer's premises is necessary to properly sell and service customers, it is agreed that Dealer and Distributor will enter into a bona fide and good faith negotiation to determine the extent of improvements necessary to fulfill the requirements of such expansion of business. Upon agreement by Distributor and Dealer of any change of said description and/or plans, a new 'Description and Plans of Dealer's Premises' shall be prepared, signed by Dealer, and approved by Distributor in writing.

Cabriolet argues that Honda negotiated in "bad faith" because Honda refused to execute a written agreement that would guarantee a specific number of additional cars if expansion took place. We do not find this to constitute a lack of good faith. The evidence showed that American Honda had no control over the number of

cars sent by its Japanese parent and thus could not guarantee in advance how many cars it would have at any given time. Under such circumstances, it is not bad faith to refuse to guarantee, in writing or otherwise, that a certain number of cars would be provided. Indeed, under these circumstances, it would be bad faith to make such a guarantee, knowing it may well not be performed. Honda's conduct here did not constitute a breach of this good faith provision in the dealership agreement.

The court also found that American Honda breached an implied condition of cooperation in the dealership agreement "when, for its own extra-contractual purposes it failed to provide vehicles [to Cabriolet] . . . when procedures were available to grant relief even under the terms of its purported system of alloca-

tion." Here, the court is apparently referring to American Honda's refusal to give Cabriolet extra cars from the fifteen percent pool unless Cabriolet established an exclusive facility.

Even assuming such an implied condition exists, we find no breach. Cabriolet received every car it was entitled to receive under the allocation system. As becomes clear in our upcoming discussion of the federal and state statutory violations, we find nothing unreasonable, unfair or coercive about American Honda's policy of using the cars in the fifteen percent pool to encourage dealers to establish exclusive facilities. It must be remembered that Cabriolet was not a dealer in trouble. At all times, it had an inventory and made a profit.

B. The Federal Automobile Dealers' Day in Court Act and Florida Statutes, Section 320.64(6)

In essence, both the Federal Act and the Florida statute prohibit automobile manufacturers/distributors from coercing or otherwise intimidating automobile dealers in regard to their business relationship. The federal Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221, et seq., "gives to an automobile dealer a federal cause of action against an automobile manufacturer who fails to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise." Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 514 (10th Cir. 1976). See also Joe Westbrook, Inc. v. Chrysler Corp., 419 F.Supp. 824, 831 (N.D.Ga. 1976). The Act

defines "good faith" as

> the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemend to constitute a lack of good faith.

15 U.S.C. § 1221(e). Case law is clear that a manufacturer fails to act in good faith for purposes of recovering under this Act only if its conduct amounts to coercion or intimidation. In absence of coercion, intimidation or threats thereof, there can be no recovery under the Act, even if the manufacturer otherwise acts in "bad faith" as that term is normally used. E.g., Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1038 (5th Cir.), cert. denied, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981); Minson

Plymouth, Inc. v. Chrysler Motors Corp., 554 F.2d 1266, 1267 (4th Cir.1977); Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 682, 685 (6th Cir. 1976); Globe Motors, Inc., v. Studebaker-Packard Corp., 328 F.2d 645, 646 (3d Cir. 1964).

Florida Statutes, section 320.64(6) also requires "coercion." That statute, in essence, prohibits motor vehicle manufacturers, distributors and importers from coercing or attempting to coerce motor vehicle dealers to enter into any agreements with them. Under section 320.697 of the Florida Statutes, any person that suffers a pecuniary loss on account of such coercion has a cause of action against the wrongdoer for damages.

The district court found that American Honda's offer of extra cars (from the 15% pool) in return for establishing an exclusive Honda facility amounted to

coercion in violation of the federal and state statutes. We disagree, holding that, as a matter of law, American Honda's conduct did not constitute "coercion."

We have little doubt that had Honda threatened to deny Cabriolet all cars, or any cars to which it was entitled, unless Cabriolet provided an exclusive facility, this would be evidence of coercion. See, e.g., Rea v. Ford Motor Co., 497 F.2d 577, 585 (3d Cir.), cert. denied, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 106 (1974); David McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974), cert. denied, 420 U.S. 992, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975); Randy's Studebaker Sales, Inc., 533 F.2d at 516; Junikki Imports, Inc. v. Toyota Motor Co., 335 F.Supp. 593, 595 (N.D.Ill.1971). This is not the case here.[13] American Honda did not

13. See supra note 12.

threaten to take away, and did not take away, cars to which Cabriolet was entitled under the allocation system.[14] Nor did American Honda treat Cabriolet inequitably or unfairly when Cabriolet refused the offer. Cabriolet continued to receive cars from American Honda and maintain an inventory until it sold its dealership to Mr. Braman. Cabriolet did not receive extra cars, but it received no less than it was entitled to receive under the allocation plan.

All American Honda did was suggest to Cabriolet a way to obtain extra cars--that

14. The only evidence of any threats of this nature was the testimony of Mr. Bower, vice president and general manager of the Friendly Dealership, that his dealership was threatened by American Honda that "if it didn't get bigger, it would get smaller." However, this "threat" was delivered in March 1983, three years after Friendly decided to focus on Honda and terminate the Saab dealership.

is, more cars than Cabriolet was entitled to receive. This does not amount to coercion. American Honda's suggestion did not present a "condition [] [i.e., the exclusive facility] which benefit[ed] only, or primarily, the manufacturer," as is typically the case in cases of "coercion." Volkswagen Interamericana v. Rohlsen, 360 F.2d 437, 442 (1st Cir.), cert. denied, 385 U.S. 919, 87 S.Ct. 230, 17 L.Ed.2d 143 (1966). Both sides would be expected to profit if Cabriolet had gone exclusive. American Honda would have better representation in the market place and Cabriolet would have the opportunity to increase its sales and profits. We find nothing coercive in presenting to a car dealer an opportunity to reap substantial profits from an exclusive dealership in exchange for the expenditures necessary to establish the exclusive dealership. All

American Honda did was provide Cabriolet an extremely lucrative option--a carrot on a stick. American Honda's conduct amounted to nothing more than "recommendation, endorsement, exposition, persuasion, urging," which, under the federal act, "shall not be deemed to constitute a lack of good faith."

III. MISCELLANEOUS BREACHES AND VIOLATIONS

A. Other Breaches of the Dealership Agreement

The district court found breaches of two other provisions of the dealership agreement. One provision is Article II, section 1, which provides

> Subject to the provisions of this Agreement, Distributor shall sell and deliver Honda Automobiles and Honda Automobile Parts to Dealer for resale and assist the Dealer and its operation relating to the resale of and customers' service for Honda Automobiles and Honda Automobile Parts.

The district court found that by refusing to deliver available Hondas to Cabriolet (presumably from the fifteen percent holdback), American Honda failed to assist Cabriolet in its operations relating to the resale of cars.

It is undisputed that during December 1978 and January 1979, American Honda did not provide any cars to Cabriolet and that it did not provide Cabriolet all the cars it requested during the hot period, even though there were some cars in the fifteen percent holdback pool. Thus, there is no doubt, and Honda concedes, that the district court correctly found that Honda refused to deliver available cars to Cabriolet. However, this refusal to deliver did not amount to a breach of American Honda's contractual duty "to assist" Cabriolet in its sale of Honda cars. Article II, section one expressly

provides that "subject to provisions of this agreement, Distributor shall . . . assist dealer . . ." (emphasis added). As explained above, provisions of the agreement permitted American Honda to establish a reasonable allocation system. American Honda established such a system. Cabriolet received all the cars to which it was entitled under that system. Cabriolet simply was not entitled to any cars during December and January and was not entitled to all the cars it requested during the hot period. Thus, American Honda "assisted" Cabriolet to the extent to which it was required under the dealership agreement.

The district court also found that American Honda breached Article III, section 7, which provides,

> Dealer and Distributor fully understand that a successful operation of Dealer's business will to a great extent depend on the amount of net working capital,

owner's equity and line of credit with which Dealer maintains its business operations, and, therefore, Dealer agrees that it will at all times maintain as its minimum net working capital, owner's equity and lines of credit in accordance with the amount set forth in a separate minimum net working capital agreement to be executed by Dealer and Distributor at the time of the execution of this Agreement. If due to changed conditions, Distributor shall deem it necessary to materially increase or decrease the amount of minimum net working capital, owner's equity or line or lines of credit for Dealer to properly operate its business, Dealer agrees to maintain the revised amount of minimum net working capital, owner's equity, or line or lines of credit, as the case may be deemed necessary by Distributor, to meet such changed conditions for the proper operation of Dealer's business and Dealer and Distributor agree to execute a new Sales Agreement, thereof setting forth such revised amounts. If the amounts thereof are increased or decreased, Dealer will meet the new minimum net working requirements within the time agreed upon by Dealer and Distributor.

The district court found that American Honda breached this provision by requiring Cabriolet to maintain excessive net working capital in its operation and refusing to decrease the net minimum capital requirements, even though Cabriolet received a decrease in the delivery of the number of cars upon which the minimum capital requirements were based. According to the court, those requirements were based on Cabriolet receiving 264 cars and when Cabriolet received less than that, American Honda was obligated under the dealership agreement to reduce the net working capital requirements.

We disagree. Nothing in section seven of Article III requires American Honda to reduce or in any way change the net working capital requirements. The provision expressly grants total discretion regarding changes to American Honda, stat-

ing, "[i]f due to changed conditions, Distributor shall deem it necessary to . . . increase or decrease the amount of minimum net working capital . . ." (emphasis added).

Further, the district court did not award any damages for this alleged breach, and Cabriolet does not challenge this. Thus, even if there were a breach, no damages award could now be based upon it.

B. Breach of "Minimum Planning Volume" Document

The district court found that American Honda also breached a written contract between itself and Cabriolet contained in the separate "Minimum Planning Volume" document attached to the dealership agreement. That document indicates that Cabriolet's minimum planning volume is 264 cars per year. The court determined that this document obligated Honda to provide

Cabriolet at least 264 cars per year and that American Honda breached this contract by not delivering that number of cars.

This finding is clearly erroneous. In support of the finding, the trial court cites only to the document. Nothing in the document indicates Honda agreed to provide 264 cars to Cabriolet. Further, virtually all the extrinsic evidence shows that the "planning volume" is not the minimum number of cars a dealer is to receive in a year, but rather is only a reflection of sales market expectation in a particular area for a particular dealer, and used for planning purposes only.

The only evidence Cabriolet points to in support of the trial court's finding is the following testimony of Mr. Diaz:

> Q. Prior to the time that you signed the four pages of Exhibit 7, did you discuss planning volume with any representative of Honda?
>
> . . . .

THE WITNESS: During the time I met with the Honda representatives, specifically Mr. Ferens and Mr. Madden both, at the offices of mine in Miami, my offices, not theirs, I was negotiating, if you will, with them for the franchise.

At that time they informed me very precisely of the terms and conditions that were required as to capitalization.

Since the franchise was, in fact, a much more expensive franchise than $79,000 in capital, the floor plan was well in excess of $150,000.

None of those were serious concerns of mine. I certainly qualified on them.

BY MR. ROSENBERG:

Q. As pertaining to the planning volume, you were told they were receiving no less than these amounts of vehicles per year, no less than how many vehicles, the amount on the--

A. Yes, 264 vehicles, and they were not only to sell these but, obviously, in theory we had to sell more if we were to increase it and American Honda would review our franchise.

Trial Record, vol. 9, at 61-62.

The vagueness of that testimony does not contradict, with clarity sufficient to support the trial court's finding, the earlier explicit testimony of this same witness, Mr. Diaz:

> Q. Did you discuss with anyone at American Honda this planning volume--264, what this meant?
>
> A. No, I did not.

Id. at 58. Given this contradiction in Mr. Diaz's testimony and all the evidence indicating that "minimum planning volume" is not the number of cars a dealer is to receive in a year, the district court's finding that American Honda breached the requirements of the document at issue here is clearly erroneous. See Anderson, 105 S.Ct. at 1512-13 ("Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder

would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination").

C. Breach of Oral Contract for Sixty Cars

The district court found that American Honda breached an oral contract to supply Cabriolet with at least sixty additional cars during the "hot" period. The court also found that the breach of this oral agreement constituted "bad faith," in violation of the federal Automobile Dealers' Day in Court Act. While we doubt the validity of this oral modification to the dealership agreement[15] and that

15. The dealership agreement provides that only certain specifically identified Honda officials may modify it and that any such modification must be in writing. The American Honda employee who allegedly promised Cabriolet the sixty cars was not one of the Honda officials authorized to modify the dealership agreement and the alleged promise to deliver sixty cars was not in writing. The alleged oral contract

such a "breach" would constitute "bad faith" under the federal act,[16] we need not address this matter, since the district court did not award damages for this breach and Cabriolet does not attack its failure to do so on appeal. Indeed, at oral argument, counsel for Cabriolet characterized this matter as "somewhat of a moot point." We will not review that which is not at issue.

D. Other Violations of Florida Statutes

The district court found that American Honda violated sections 320.64(4) and (8) and section 320.641 of the Florida

15. (Continued)
for sixty cars was a modification of the dealership agreement. That agreement permitted Honda to adopt and implement a reasonable allocation system. Honda had done so, and communicated that system to Cabriolet. Under that system, Cabriolet would not receive an extra, unearned sixty cars, unless it provided an exclusive facility or was a new dealership.

16. See discussion slip op. page 250, pages ___ - ___ of text.

Statutes. Under section 320.697, an automobile dealer suffering pecuniary loss on account of a violation of these provisions by a motor vehicle manufacturer, distributor, and/or importer has a cause of action against that party for damages.

Subsection 320.64(4) essentially forbids motor vehicle distributors, manufacturers, and importers from engaging in any illegal act relating to their business. The district court found that American Honda violated this provision because its breaches of the dealership agreement and violation of the federal Automobile Dealers' Day in Court Act amounted to engaging in "an illegal act relating to . . . [its] business."

Because we have held that American Honda did not breach its dealership agreement or violate the federal act, the district court's decision here cannot be

sustained. We also note, though we need not decide, that contract breaches and violations of the federal act apparently do not constitute an "illegal act" for purposes of the Florida statute. See Gates v. Chrysler Corp., 397 So.2d 1187, 1190 (Fla. Dist. Ct. App. 1981) (for purposes of the statute, an "illegal act" is an act subject to criminal penalties).

Subsection 320.64(8) is violated if a motor vehicle manufacturer, distributor or importer

> has unfairly or without due regard to the equities of a motor vehicle dealer, or without just provocation, canceled or failed to renew, the franchise agreement of such motor vehicle dealer.

Section 320.64(1)(a) provides that motor vehicle manufacturers, distributors and importers

> shall notify the motor vehicle dealer and forward a copy of such notice to the department of . . . [their] intention to discontinue, cancel, or fail to renew the franchise agreement of any of its motor vehicle dealers

> at least 90 days before the effective date thereof, together with the specific grounds for discontinuation, cancellation, or failure to renew of said agreement, if discontinued, canceled, or not renewed.

The district court found both sections were violated when Honda refused to renew Cabriolet's dealership agreement when it expired by its own terms on October 31, 1979. According to the court, American Honda refused to renew the agreement because Cabriolet would not erect exclusive facilities and Cabriolet had filed this lawsuit.[17]

17. The court further found that 320.641 (1)(a) was also violated when American Honda discriminated against Cabriolet in allocation and distribution of vehicles, thereby constituting a de facto "termination" or "discontinuance" of Cabriolet's dealership, in violation of the notice requirements of Section 320.641. The record does not support a finding that Cabriolet was discriminated against in allocation. Cabriolet points to no evidence, and we do not find any evidence, indicating that Cabriolet did not receive every car to which it was entitled under American Honda's allocation system.

We find neither 320.64(8) nor 320.641(1)(a) applicable. Both provisions contemplate an actual termination of the business relationship between the dealer and distributer. The uncontroverted evidence shows that American Honda continued sending cars to and engaging in business with Cabriolet up until May 1980 when Mr. Diaz sold the Honda dealership to Mr. Braman. Even after the dealership agreement supposedly expired in October 1979, Honda continued to allocate cars to Cabriolet.[18] Even the district court found that

17. (Continued)
The court also found that American Honda violated section 320.64(7), which forbids manufacturers from "unfairly or without due regard to the equities of a dealer, or without just provocation, threaten[ing] to cancel or not renew a franchise agreement. . . ." There is no evidence in the record to support this finding.

18. Between November 1979 and April 1980, Cabriolet received ninety-nine cars from Honda.

American Honda at no time took any steps toward formal termination of the dealership. If anything, American Honda's conduct implied a renewal of the dealership agreement. The only step American Honda failed to take was to renew the agreement formally in writing. We will not put form above substance in this instance. American Honda's conduct did not amount to a "failure" to renew within the meaning of the Florida Statute. Thus, 320.641(1)(a) and 320.64(8) do not apply.

We further note that, even if these sections did apply, no pecuniary injury was suffered on account of the absence of a formal agreement. Cabriolet continued to operate as a Honda dealer and receive cars until May 1980. Cabriolet suggests it was injured in that it felt like a "second class citizen." However, the Florida

statute permits damages to be awarded for pecuniary injuries only.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court, which concluded that American Honda breached contracts with Cabriolet and violated the federal Automobile Dealers' Day in Court Act and various Florida statutes. Judgment shall be entered in favor of appellant American Honda.

REVERSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-3409-CIV-ALH

CABRIOLET PORSCHE AUDI, INC.
A Florida corporation,
d/b/a Cabriolet Honda Car,
Plaintiff,

vs. AMENDED FINAL JUDGMENT

AMERICAN HONDA MOTOR CO.,
INC., a California corporation,
Defendant.

CABRIOLET PORSCHE AUDI, INC., d/b/a CABRIOLET HONDA CAR, the plaintiff in this action, is a Florida corporation and, was at all times pertinent to this action, a non-exclusive Honda dealer. CABRIOLET has sued AMERICAN HONDA MOTOR CO., INC., which is a wholly owned subsidiary of Honda Motor Company, Ltd., the Japanese manufacturer and a California corporation. This dispute centers around the Dealer Agreement which was made a part of this record.

The case was tried to the Court without a jury. The Court finds as follows:

FINDINGS OF FACT

1. Cabriolet is a corporation organized and existing under the laws of the State of Florida. From September, 1978 to March, 1980 Cabriolet's principal place of business was at 3780 Bird Road, Miami, Florida (Ex. P-7).

2. American Honda Motor Co., Inc. (American Honda) is a wholly owned subsidiary of Honda Motor Company, Ltd., the Japanese manufacturer, and is a corporation organized and existing under the laws of the State of Claifornia, having its principal place of business in Gardena, California, and a regional office in Norcross, Georgia. American Honda automobiles under Chapter 320.61(1) Florida Statutes. (Ex. p.7, p.24; Diaz,

Tr. 64; Ferens, Tr. 540; Madden, Tr. 762; Defendant's Answer to Amended Complaint.)

3. As a wholly owned subsidiary, American Honda, is the exclusive importer and distributor of Honda automobiles throughout the United States, which it received from its parent corporation, the Japanese manufacturer of Honda. The Japanese manufacturer of Honda controls American Honda and makes and has the right to make all of the decisions regarding marketing of vehicles. (Answer to Amended Complaint, Affirmative Defense Seven, Diaz, Tr. 64, Ex. P-7, Ex. P-24) American Honda has no independent distributors in the United States. (Schmillen Dep. 10/28/82 p. 14; Madden, Tr. 762).

4. Frank L. Diaz, the owner of Cabriolet, first became involved in the automobile business in the summer of 1976 when he acquired Reinhart Volkswagen in

Miami (Diaz, Tr.45). In 1977, Mr. Diaz acquired a Volvo dealerhip from De Maria's Orange Motors. (Diaz, Tr. 46). Mr. Diaz was the factory-approved dealer principal in day-to-day control of the Volkswagen-Volvo dealerships. (Diaz, Tr. 47; Petrucci, Tr. 149).

5. The De Maria Honda Car operations, as authorized and required by American Honda, had been operated for many years at a motorcycle location on Bird Road. In May, 1976, American Honda demanded that it be moved to the building at 3780 Bird Road at which De Maria also operated his Porsche, Audi, and Ferrari franchises. This demand was acceded to by the De Maria Organization (Petrucci, Tr. 147-151).

6. The De Maria-run operation of the Honda Car dealership, received numerous

complaints, especially with respect to its customer service. (Diaz, Tr. 51-52). Indeed, during a 1977 independently commissioned Dealer Image Survey conducted for American Honda, De Maria's rating was -16.11, when the mean score for all United States dealers was +431.43. (Ex. P-10; Ferens Tr. 745). American Honda was not satisfied with the Miami representation given to its products by De Maria (Ex. P-26).

7. Frank Petrucci was General Sales Manager of the De Maria's dealerships beginning in 1975. (Petrucci, Tr. 147). Under Mr. Petrucci, De Maria had never had any difficulty in receiving Honda cars for resale (Petrucci, Tr. 159).

8. During June, 1978, after negotiations, Mr. Diaz agreed to purchase the De Maria Porsche, Audi, Honda and Ferrari dealership being operated at 3780 Bird

Road, in Miami, Florida. (Diaz, Tr. 47-48).

9. The total purchase price paid by Cabriolet for the De Maria Porsche, Audi, Honda, and Ferrari dealership was $1.6 million. Of this amount, approximately $100,000 was for physical assets related to Honda, and $400,000 was for the good will (transfer of the franchise) associated with Honda. No cars were included in the $100,000 purchase price for Honda-related physical assets (Diaz, Tr. 65).

10. By the Summer of 1978, American Honda decided internally that it did not want to have dual dealers in South Florida, and American Honda set out upon a course of conduct designed to coerce dealers into removing their Honda operations from their other franchise lines. (Ferens, Tr. 624). Unknown to its dealers, the company set upon a policy by

July, 1978 to obtain exclusive Honda dealerships in the Miami area (Ferens Tr. 626; Madden, Tr. 779).

11. Mr. Diaz and Cabriolet filed an Application for a Honda Dealership, together with all other required documents, during the Summer, 1978. (Ex CF, Ex P-13).

12. At the time of the filing of Cabriolet's application, and at the time of the subsequent execution of its Honda Dealer Agreement, Wayne Ferens was American Honda's District Sales Manager in South Florida; Robert Madden was the Zone Manager, based in Norcross, Georgia (Ferens, Tr. 575; Madden, Tr. 762); Jack Billmyer was the Eastern Regional Sales Manager and Clifford Schmillen was Vice President, for Automobile Sales (Ferens, Tr. 576; Ex. P-7).

13. Cabriolet signed a Honda Dealer Agreement ("Dealer Agreement") dated October 13, 1978, which by its terms expired on October 31, 1979. (Ex. P-7, P-24; Diaz, Tr. 55). This Dealer Agreement required that the Cabriolet Honda operations continue to be conducted only from the premises at 3780 Bird Road, Miami, Florida, the same facility as had housed the De Maria operations. At the time that the Dealer Agreement was signed, Porsche, Audi, Honda and Ferrari were all being sold from those premises (Diaz, Tr. 56) with the approval and consent of American Honda (Ex. P-7).

14. The Dealer Agreement, was prepared by American Honda, was preprinted, and was the only standard form agreement used by American Honda for all of its dealers. It provided, in pertinent part, as follows:

"Subject to the provisions of this Agreement, Distributor shall sell and deliver Honda Automobiles and Honda Automobile Parts to Dealer for resale and assist the Dealer in its operation relating to the resale of and customers' service for Honda Automobiles and Honda Automobile Parts." (Article II, Section 1, Page 1)

* * *

"In the event of shortage or restricted supply, Dealer gives Distributor the right to allocate such supply in any reasonable manner Distributor deems fit in any geographical market area." (Article VII, Section 2, Page 10)

"To provide proper Honda Automobile and Honda Automobile Parts representation commensurate with the reputation and goodwill attached to the name "Honda" and to facilitate the proper sales and servicing of Honda Automobiles and Honda Automobile Parts, Dealer will maintain business premises satisfactory to Distributor with respect to appearance, location, size of buildings, space allotment and adequate layout as well as equipment, showroom, office, storage space, used car lot, body repair and paint shop, if any, parking facilities, workshop and service operation; each of which shall comply with the

standards, policies, and directives of Distributor as developed in proportion to the number of Honda Automobiles and Honda Automobiles Parts that may reasonably be expected to be sold and serviced by Dealer." (Article III, Section 1, Page 3)

* * *

"Once a dealer has established its business facilities at a location mutually satisfactory to Dealer and Distributor, Dealer will not move to or establish a new or different location, branch sales office, branch service establishment, or any place or business including any used automobiles or truck lots or location without first obtaining a written approval of the distributor." (Article III, Section 4, Page 4)

* * *

"If during the term of this Agreement, expansion of Dealer's premises is necessary to properly sell and service customers, it is agreed that Dealer and Distributor will enter into a bona fide and good faith negotiation to determine the extent of improvements necessary to fulfill the requirements of such expansion of business. Upon agreement by Distributor and Dealer of any change of said description and/or plans, a new "Description and Plans of Deal-

er's Premises" shall be prepared, signed by Dealer, and approved by Distributor in writing." (Article III, Section 3, Page 3)

* * *

"Dealer and Distributor fully understand that a successful operation of Dealer's business will to a great extent depend on the amount of net working capital, owner's equity and line of credit with which Dealer maintains its business operations, and, therefore, Dealer agrees that it will at all times maintain as its minimum net working capital, owner's equity and lines of credit in accordance with the amount set forth in a separate minimum net working capital agreement to be executed by Dealer and Distributor at the time of the execution of this Agreement. If due to changed conditions, Distributor shall deem it necessary to materially increase or decrease the amount of minimum net working capital, owner's equity or lines of credit for Dealer to properly operate its business, Dealer agrees to maintain the revised amount of minimum net working capital, owner's equity, or lines of credit, as the case may be deemed necessary by Distributor, to meet such changed conditions for the proper operation of Dealer's business and Dealer and Distributor agree to execute

> a new Sales Agreement, thereof [sic] setting forth such revised amounts. If the amounts thereof are increased or decreased, Dealer will meet the new minimum net working requirements within the time agreed upon by Dealer and Distributor." (ArticleIII, Section 7, Page 4)
>
> (Ex. P-24 [Emphasis supplied]).

15. Attached to the Dealer Agreement was an important document entitled "Minimum Requirements, PLANNING VOLUME-264". This document which was signed by Mr. Diaz on September 15, 1978, had been prepared by American Honda, and set out American Honda's minimum requirements for capitalization of Cabriolet's business. Planning Volume -- the minimum number of vehicles the dealership was expected to sell in one year -- was 264 Honda automobiles. The required working capital was $79,792 and net worth was required to be $97,364. Various other requirements were made by American Honda fully expected Cabriolet to

strictly adhere to, and to maintain those original capital requirements (Billmyer, Tr. 1126-7).

16. The 264 car planning volume was the same planning volume as De Maria's, under which De Maria was able to get all the cars it needed. (Petrucci, Tr. 63).

17. Mr. Diaz was advised by American Honda during the Summer of 1978 that Cabriolet was to receive at least 264 Honda cars, and that he was to sell at least that many. (Diaz, Tr. 61-62).

18. At the time Carbriolet made its application, it was the responsibility of Mr. Ferens to fill out Dealership Evaluation forms for applicants of dealerships being transferred. (Ferens, Tr. 601). Mr. Ferens met with Mr. Diaz and Mr. Petrucci on July 26, 1978. Despite American Honda's dedualling policy, Ferens testified that he advised against Cabriolet's

immediately building a separate Honda facility (Ferens, Tr. 619), because American Honda recognized a new dealer should not be pushed into doing something he might regret later on, (Ferens, Tr. 622), especially in view of the big expense associated with building a new dealership facility. He said that American Honda wanted to give a new dealer time to get familiar with the product and the company and consider going exclusive in the future, rather than telling him to go exclusive, and bearing that additional added expense initially. (Ferens, Tr. 622); Mr. Diaz responded to Mr. Ferens on July 26, 1978 that "if and when sales increase and the amount of vehicles supplied and sold can support a separate facility, Mr. Diaz will expand." (Ferens, Tr. 608, Exhibit 20 [Emphasis Supplied]). Mr. Diaz also told Mr. Ferens that Mr. Diaz agreed

with him and "plans to keep Honda in the present facility until sales improve to justify a separate location."

19. At the time that Cabriolet applied to succeed De Maria, it was American Honda's understanding that the dealership would stay at the De Maria premises (Madden, Tr. 778) and the Dealer Agreement issued by American Honda reflected this understanding. . (Ex. P-7).

20. During the period between Cabriolet's Application and the issuance of the Dealer Agreement, American Honda had no written system of allocating automobiles (Madden, Tr. 764, 766; Bengston Depo. 4/15/80, at 7; Bowers, Tr. 548; Augustine, Tr. 527) and no method of distribution, written or oral, ever was communicated to Cabriolet by representatives of American Honda, (Diaz, Tr. 53; Petrucci, Tr. 153; Snay, Tr. 316). In fact, Cabriolet had

reason to believe that it would receive at least 264 Hondas per year (Diaz, Tr. 61-62).

21. From July, 1978 to March, 1979 the market in the United States generally and especially in South Florida for the retail sale of Honda Automobiles was very "soft", and the market did not become "hot" until the second Arab Oil embargo in the Spring of 1979 (Petrucci Tr. 157; Diaz, Tr. 71; Snay, Tr. 320, 323; Bowers Tr. 548; Ferens, Tr. 659, 665, 666; Madden, Tr. 818; Augustine, Tr. 524). This period was not a time of "shortage" of Honda cars (Madden, Tr. 818), and was not a time of "restricted supply" (Ex. P-24).

22. The first time that American Honda ever adopted any automobile allocation policy was June 4, 1981, approximately two years after the filing of the

Complaint in this case and about fifteen months after Cabriolet ceased being a dealer (Ex. FJ). Before June 4, 1981, American Honda distributed its cars to dealers pursuant to no standardized method. No two witnesses who testified at the trial on behalf of Plaintiff or Defendant had the same understanding, or were able to similarly describe the workings of a method of allocation of vehicles which American Honda represented to this Court as being "substantially the same" from at least 1977 (Testimony generally; Smoot, Tr. 36). The only ascertainable fact consistently testified to was that American Honda unilaterally and secretly decided not to allocate fifteen percent (15%) of its available product to its dealers pursuant to <u>any</u> method. This 15% withholding of cars was never told to the dealer body, and is not

mentioned in the June 4, 1981 written description. This 15%, representing more than 50,000 cars per year during the period that Cabriolet was a dealer, was distributed solely at the whim or caprice of certain employees of American Honda under the guise of being cars damaged in transit and detained for repairs at their port of entry. (Cardiges, Tr. 507, 510-511; Bengston Depos. 9/20/82, Tr. 80-81).

23. By the Summer of 1978, American Honda had decided to hold out extra cars from the secret 15% pool and to use those cars to pay off Honda dealers who met its demands, gave up dual facilities, and built exclusive Honda facilities. The evidence as to the numbers of cars to be allocated to such dealers conflicted, ranging from zero (Ferens, Tr. 629) to between 150-200% of monthly planning volume (Ex FJ, page 3), to 160% (Ex.

P-32), to 200% of monthly planning volume, (Madden Tr. 783). However, Honda unilaterally reserved the right to renege even if exclusive facilities were built by a dealer, if it decided that the extra cars were not available (Ex. FJ, page 3); Ferens, Tr. 705, 706, (Ex. P-56; Bengston Despos. 9/20/82 Tr. 106-107).

24. Cabriolet commenced its Honda operations, with Honda's approval, during mid-September, 1978 (Petrucci, Tr. 156), although its Dealer Agreement is dated October 13, 1978 (Ex. P-7).

25. In 1978, Cabriolet's receipts of Honda cars consisted of:

September	4	(from De Maria)
September	27	(from American Honda)
October	14	"
November	64	"
December	0	"
	109	

(Ex. P-12; Snay Tr. 363).

Had American Honda distributed cars during late 1978 pursuant to any purported method testified to by anyone at trial, Cabriolet would have received no more than 44 cars during October and November. No witness was able to explain why Cabriolet received 27 cars during September and an additional 78 cars during October and November, 1978.

26. During the period September 16 through December 31, 1978, Cabriolet sold the following numbers of Honda cars:

September	3
October	25
November	16
December	19
	63

Excluding September 1978, (a month in which Cabriolet was in possession of the premises for two weeks but had no Dealer Agreement), Cabriolet sold an average 21 cars per month,' or one car fewer than its monthly Planning Volume, (Ex. P-112), despite there being a "soft" market, and despite the fact that inventory consisted of mostly year-old cars. During the last quarter of 1978 Cabriolet thought 30-35 cars per month would be a better objective for it, but American Honda believed that even at Cabriolet's existing facility,

> ". . . with this kind of availability and more on the horizon, that 65 to 75 units (per month) would be a more realistic im-

mediate objective and one you are capable of achieving." (Ex. P-26) (Emphasis Supplied).

27. Contrary to those American Hondas representations (Ex. P-26) Cabriolet received no cars in December, 1978 and no cars in January, 1979 (Ex. P-112).

28. Except for three months in which new models were introduced (March and April, 1979 - Prelude new model introduction; November, 1979 - 1980 new model year introduction) and were made available to all dealers without regard to "allocations" (Ex. P-3; Diaz, Tr. 70-71), Cabriolet never received its monthly planning volume (22 cars) from American Honda in any month during the period it was a dealer (Ex. P-112).

29. In the 20 months in which Cabriolet was a Honda Dealer, Cabriolet received and sold the following Honda cars:

	Received	Sold
	4 (from De Maria)	
Sep. 1978	27	3
Oct. 1978	14	25
Nov. 1978	64	16
Dec. 1978	--	19
Jan. 1979	--	18
Feb. 1979	9	20
Mar. 1979	36*	24
Apr. 1979	32*	39
May 1979	10	21
Jun. 1979	10	9
Jul. 1979	11	11
Aug. 1979	13	11, 16
Sep. 1979	8	4
Oct. 1979	9	18
Nov. 1979	29*	18
Dec. 1979	12	11
Jan. 1980	15	23
Feb. 1980	7	5
Mar. 1980	18	23
Apr. 1980	18	2
	346	320
May 1980		19, 10
Jun. 1980		1
		345

*New Model intro;
not based on allocation

(Ex. P-112). During the first six months of 1979, FIV ("Sold Out") Dade County dealers registered sales of 1485 Hondas (Petrucci, Tr. 162; Ex. P-27). Cabriolet only received 96 or 97 vehicles from American Honda (Ex. P-27). Thus, at a

time when the overall Dade County Honda dealer body (including Cabriolet) was selling 50 Hondas each month, Cabriolet only received an average of 15 Hondas each month.

30. At all times while Cabriolet was a dealer, American Honda set monthly sales objectives for Cabriolet. American Honda's records demonstrate that Cabriolet attained 100% or more of American Honda's objectives beginning in February, 1979 and during the remainder of its tenure as a dealer except for April, 1979 when Cabriolet attained 96.6% of American Honda's objective (one car short), (Ex. P-29, P-30).

31. American Honda again commissioned J.D. Powers and Associates to prepare an independent Dealer Image Survey report regarding every one of its dealers (Exs. P-8, P-9, P-10). In 1979, Cabriolet

attained the highest score, +583, of any Honda dealer in its district (Ferens, Tr. 740-741). This tally was (i) 152 points higher than the mean score achieved by all other Honda import duals in the United States, and (ii) 40 points higher than the mean score for exclusive Honda dealerships. (Exs. P-8, P-9, P-10). In less than one year as a Honda dealer, Cabriolet had succeeded in reversing the poor image for Honda which had been associated with its predecessor, De Maria. Cabriolet's improved customer image was the result of an affirmative policy not to discount Honda cars (established by Mr. Diaz in September, 1978) but, rather, to use the proceeds of full manufacturer's suggested retail sales price to improve the service made available to Honda customers at 3780 Bird Road. (Diaz, Tr. 68-69).

32. Cabriolet had not been advised by anyone from American Honda in 1978 that if Cabriolet did not push out every Honda car it received, it's future allocations would be reduced. (Diaz, Tr. 70). Nor did anyone, in the early months of 1979, alert Cabriolet to the fact that if Cabriolet didn't "move" more vehicles, subsequent allocations would be diminished. (Ferens, Tr. 661). Nor did Cabriolet report cars as sold which in fact were unsold, as did other dealers (with the knowledge of American Honda) in order to cheat and get more cars (Ex. P-40).

33. By the Spring of 1979, when demand for Hondas greatly exceeded supply, Cabriolet had a backlog of at least 50-60 orders for Honda automobiles and customers were complaining (Diaz Tr. 74-76; Snay Tr. 330-331). Other Miami dealers had plenty of cars (Snay, Tr. 331).

34. Beginning in December 1978, American Honda made a substantial reduction in the number of cars it delivered to Cabriolet (Petrucci, Tr. 161; Diaz, Tr. 78; Snay, Tr. 324; Ex. P-112). In December, 1978, January, 1979 and February, 1979, Cabriolet only received 9 cars but was able to sell out of its "year-old" inventory (Ex. P-112). Mr. Petrucci began complaining to Mr. Madden on a daily basis (Petrucci, Tr. 162) and continued to complain from February until June of 1979 (Petrucci, Tr. 163, 167). Mr. Snay called Mr. Ferens at home on Mondays beginning February, 1979 to complain about the lack of cars (Snay, Tr. 324-325, 343) and Mr. Ferens told him not to worry, that the cars would arrive (Snay, Tr. 324; Diaz, Tr. 76-78). American Honda's only real response to Cabriolet's pleas for cars was that Cabriolet was "stuck" with a low

allocation Cabriolet had unwittingly established in 1978 (Ferens, Tr. 673, 675), and that the only way to increase its allocation was for Cabriolet to separate Honda from its other franchise operations. (Petrucci, Tr. 167; Ferens, Tr. 675, 678, 680; Madden, Tr. 330; Snay, Tr. 330, 333, 335, 340).

35. In March and April, 1979 Cabriolet, like all other United States Honda dealers, received its share (80/20 - Ex. P-3) of the newly introduced 4-door Accords and Prelude Sport Coupes, which cars were distributed based upon Planning Volume, not "allocation" travel rate. Cabriolet sold those cars (Ex. P-112). Despite the "sold out" condition of Cabriolet's inventory beginning in May, 1979 (Ex. P. 129 [100% objective]), Cabriolet received only between 8 and 13 cars

per month until the November, 1979 new model introduction (Ex. P-112).

36. Sometime around March 22, 1979, Mr. Ferens looked over potential sites for exclusive Cabriolet Honda facilities, (Ferens, Tr. 667).

37. In approximately April, 1979, Mr. Petrucci was once again told by Mr. Madden that Cabriolet would get additional automobiles only if it took its Honda operations out of the existing dealership. Mr. Petrucci responded that Mr. Madden would have to show him that Cabriolet really would get more Honda vehicles before he could ask Mr. Diaz to expend additional money for a new facility. (Petrucci, Tr. 166).

38. American Honda refused Cabriolet's request to commit to any specific number of automobiles it would receive in the event that Cabriolet built an exclu-

sive facility (Snay, Tr. 335, 343, 347; Ferens, Tr. 682, 684). Thus, American Honda refused to enter into a "bona fide and good faith negotiation" regarding expansion of the dealer's premises (Ex. P-24, page 3), and, instead, American Honda attempted to coerce Cabriolet to build exclusive facilities upon penalty of not receiving cars.

39. During the period involved in this case, other Florida Honda dealers acceded to American Honda's demands that they change from theretofore approved "dual" to "exclusive" dealerships. Included in this category were Moody Honda in Ft. Lauderdale, Friendly Honda in North Miami, Globe Auto Imports in Clearwater, Southgate Honda in Ft. Myers, Roger Haller Honda in Orlando, the Import Car Store in Melbourne, Honda South in South Miami and perhaps others. (Ferens, Tr. 699-700).

Mr. Ferens was involved in each of these changes (Ferens, Tr. 700).

40. Although Mr. Ferens told other dealers, that they could get an extra allocation of one month's supply of cars by building only a separate showroom (Ferens, Tr. 703-704), Mr. Ferens never made this statement to Cabriolet, because American Honda wanted a full, exclusive dealership from Cabriolet, not just a separate showroom (Ferens, Tr. 680).

41. American Honda utilized its ability to secretly allocate automobiles which dealers did not know existed (15% of all imports) as a weapon against dealers like Cabriolet who refused to expend millions of dollars upon verbal representations regarding receipt of more cars. American Honda's course of conduct is illustrated by its contemporaneous treatment of two Miami competitors of Cabriolet.

42. In 1978, Friendly Ford/Saab/Honda retailed 323 new Hondas at an average profit of $691. In 1979, it sold 399 Hondas at an average profit of $919. (Bower, Tr. 551-552). During 1979, Friendly retailed 526 Hondas at an average profit of $1,319. (Bower, Tr. 552). Prior to 1980, Friendly was a Saab dealer, as well as a Ford and Honda Dealer. Friendly then gave up Ford but still was not treated as a "single point" dealer by American Honda. The "word" from Honda was that it wanted Friendly to become exclusively Honda. American Honda orally represented that additional cars would be given to Friendly if it got rid of Saab, (Bower, Tr. 554-555), and threatened Friendly that "if it didn't get bigger it would get smaller." (Bower, Tr. 571). Shortly thereafter, Saab was no longer located at the Friendly facility (Bower, Tr. 557). In 1981, after

removing Saab and Honda from its premises, Friendly received enough Hondas to retail 538 Hondas at an average profit of $1,078. In 1982, it retailed 433 Hondas at an average profit of $1,088. (Bower, Tr. 558).

43. Ron Esserman is an automobile dealer who owns Honda South on South Dixie Highway, Miami. During 1978 and 1979 Honda South was not an exclusive Honda dealer but, rather, also sold BMW's and Volkswagens (Esserman, Tr. 449). The Honda line had been added to the BMW and Volkswagen order to obtain the Honda line Esserman constructed a separate Honda showroom. Used car service and sale of Honda parts continued alongside the Volkswagen and BMW operations in the main facility. (Esserman, Tr. 452-453). For the seven months in 1978 that it was a dual (triple) dealer, Honda South received

281 cars from American Honda. (Esserman, Tr. 481, ex. P-125). In 1979, Honda South received and sold 690 Hondas at an average profit of $1,161. (Esserman, Tr. 490). Thus, despite selling 100 cars fewer in 1978 than Honda South received from American Honda, that dealership still received almost triple the number of cars in 1979 that it received in 1978. (Esserman, Tr. 490).

44. The distribution to Honda South of at least 690 cars in 1979, despite its sale of only 188 out of 281 Honda cars during 1978 (its first year in business), is inconsistent with any alleged system of allocation testified to by any Honda employee, especially when contrasted with Honda's treatment of Cabriolet during the same time period. Moreover, the threat made to Friendly (about becoming smaller

unless it got bigger) became a reality at Cabriolet (Ex. P-11-2).

45. Simultaneously with American Honda's continuing refusal to provide Cabriolet with a reasonable supply of available vehicles, American Honda representatives repeatedly attempted to coerce Cabriolet into building a new facility. For example, sometime after April, 1979 Mr. Madden visited the Cabriolet facility and met with Mr. Diaz and Mr. Petrucci. Mr. Madden told Mr. Petrucci that American Honda wanted Cabriolet to obtain a lot owned by an Alfa Romeo dealership across the street from Cabriolet, or any other facility, and that when Cabriolet built an exclusive facility for Honda, American Honda would give Cabriolot an additional allocation of 50 cars per month. (Petrucci, Tr. 168; Diaz, Tr. 82). Subsequently, Mr. Madden and Mr. Diaz

discussed the possibility of acquiring the Alfa dealership's lot, and Mr. Diaz advised that it would cost approximately $850,000 to put a sales facility on that lot with service and Honda parts remaining at the existing location. (Diaz, Tr. 85). Mr. Madden still refused to give a written commitment to Mr. Diaz for any additional number of cars if Mr. Diaz authorized this huge expenditure. (Diaz, Tr. 87; Ferens, Tr. 684). Cabriolet did not build the exclusive facility, since the number of cars received each month at that time could not justify Cabriolet paying $20,000 or more a month in mortgage payments to finance a new facility (Diaz, tr. 87).

46. In the Summer of 1979, Mr. Ferens, acknowledging at least to Cabriolet the inequities of the situation, recommended to his Honda superiors that Cabriolet received an increase in cars,

stating, "I feel we should try to increase dealer, if possible, considering." (Emphasis Supplied) (Ferens, Tr. 685, 687, Ex. 57, 14). Mr. Ferens advised either Mr. Diaz or Mr. Petrucci of his recommendations.

47. Approximately July 1, 1979, Mr. Ferens advised Cabriolet that two boatloads of cars were arriving during July, and that Cabriolet would be given approximately 20 to 25 from one shipment and 40 to 45 from the other. (Petrucci, Tr. 169-170; Snay, Tr. 346; Ex. P-90; Ex. P-111). Mr. Ferens also told Cabriolet that since the vehicles were coming in without air conditioners, Cabriolet should "special order" air conditioners immediately and have them in stock, because the extra cars would be there in a few days. (Petrucci, Tr. 175; Snay, Tr. 342-343; Ex. P-111). Cabriolet immediately ordered

and paid for 60 air conditioners at a cost of approximately $25,000.00 (Snay, Tr. 342-343; Davis, Tr. 386-388). However, the vehicles that Mr. Ferens had promised never arrived. (Petrucci, Tr. 176-177; Davis, Tr. 388; Snay, Tr. 346-352). When Cabriolet complained about this breach, American Honda's only response was the by then too familiar refrain that Cabriolet had to go exclusive to get more cars. (Petrucci, Tr. 190-191; Snay, Tr. 350-352). Sale of these promised 60 vehicles would have dramatically increased Cabriolet's future allocations. Such sale would have occurred in the "hot" market.

48. While Mr. Madden professed to Mr. Petrucci that he would discuss the distribution matter with his supervisor, Mr. Billmyer (Petrucci, Tr. 196-197), Mr. Madden disingenously wrote a memorandum to Mr. Billmyer stating that no expansion had

been started, and recommending that American Honda look with favor on a sale of the dealership (Ex. P-63).

49. On July 13, 1979, Mr. Petrucci sent a mailgram to American Honda (Ex. P-27) ordering 200 Honda vehicles. No response ever was received, and the cars were not shipped. (Petrucci, Tr. 196-197).

50. American Honda refused to distribute more cars to Cabriolet because Cabriolet did not build an exclusive facility for Honda as demanded by American Honda, in spite of the fact that Mr. Ferens recommended and promised Cabriolet more cars "considering" (Ex. P-57), and the fact that Madden had authority to ship additional cars to Cabriolet (Ferens, Tr. 682; Schmillen, Depo. 10/28/82, P-36, 63-64). Notwithstanding the fact that Madden, contrary to Vice President

Schmillen, called American Honda's allocation system "inflexible" (Madden, Tr. 833) the record is replete with examples of shipments to competing dealers, including Ron Norris Honda (Ex. P-38; Madden, Tr. 833) and Carey Paul Honda (Ex. P-36; Madden, Tr. 841-848), of vehicles out of the secret 15% reserve which were made at the instance of American Honda employees.

51. No evidence was presented by American Honda to explain why separate, exclusive facilities for Honda operations of a dealer were necessary or desirable in a "hot" market, when all dealers, including Cabriolet, were selling every car they received at full list price and still had a backlog of orders.

52. No evidence was presented by American Honda to explain how any dealer, including Cabriolet, could benefit by

spending millions of dollars for separate, exclusive facilities for Honda in a "hot" market, absent a binding commitment to receive additional vehicles.

53. No evidence was presented by American Honda to demonstrate that the consuming public actually suffered or would have suffered any damage or injury by Cabriolet's failure to build a separate, exclusive facility for American Honda.

55. On October 31, 1979, Cabriolet's Dealer Agreement with American Honda expired by its terms. (Ex. P-7). This Dealer Agreement was the only Dealer Agreement ever issued to Cabriolet by American Honda. (Diaz, Tr. 93-94; Ex. P-82). At no time did American Honda ever take any steps towards formal termination of Cabriolet, nor did American Honda ever notify Cabriolet that Cabriolet was in

breach of any of the terms of its Dealer Agreement. Both Mr. Ferens and Mr. Madden had the responsibility to make recommendations to their superiors concerning renewal of all dealers' Honda Dealer Agreements, (Ex. P-32). Both Mr. Ferens and Mr. Madden, without explanation, failed to recommend renewal of Cabriolet (Ferens, Tr. 582); Madden, Tr. 769; Ex. P-32). Cabriolet's Dealer Agreement never was renewed after it had expired.

56. American Honda's reasons for nonrenewal of Cabriolet's Dealer Agreement were the refusal of Cabriolet to construct a new facility for Honda without an enforceable commitment to receive more cars, and the filing of this lawsuit.

57. In the first quarter of 1980, Mr. Diaz sold the Cabriolet Honda dealership to Norman Braman. Mr. Braman paid the same $400,000 blue sky (Braman, Tr.

405) as Mr. Diaz had paid to Mr. De Maria; however, Mr. Diaz paid a $25,000 sales commission. In addition, Mr. Braman purchased certain physical assets at their actual dollar value, in the sum of approximately $89,000. (Diaz, Tr. 90).

58. The sale of Cabriolet's Honda dealership was a direct result of American Honda's refusal to supply available Honda automobiles to Cabriolet (Diaz, Tr. 80).

59. Mr. Braman met with Mr. Madden prior to signing an agreement with Mr. Diaz to discuss the number of cars that his new dealership would be getting from American Honda. (Braman, Tr. 407). Mr. Braman agreed to build a new facility on Bird Road near the Palmetto Expressway exclusively for Honda. This dealership was built in the latter part of 1980. (Braman, Tr. 414). By letter of intent (never offered to Cabriolet) Braman was

approved by American Honda in April, 1980 at exclusive facilities (Exhibit 39; Braman, Tr. 416). Mr. Braman was allowed to begin selling cars while his new facility was under construction in June, although his dealership did not officially open until completion in the latter part of 1980. (Braman, Tr. 417). During the seven months in 1980 that Mr. Braman was a Honda dealer, Honda delivered 424 vehicles to Braman's new dealership. During 1980, Mr. Braman's first partial year as a dealer, his dealership averaged $1,726 gross profit per new Honda vehicle retailed, and he sold 345 of the 424 Units delivered. (Braman, Tr. 431). Yet, in 1981, American Honda delivered to Mr. Braman 897 units, and in 1982, 1385 units. (Braman, Tr. 426, Exs. p-113, 114, 115, 116, 117, 118). The record does not explain why Braman, who sold 345 out of

424 available Hondas in a runaway market was given double the allocation during the following year. Once again, The 'Braman history is inconsistent with every offered explanation of Honda's purported "inflexible" system.

60. In August, 1980, shortly after Mr. Braman became a dealer and started to receive almost 60 cars per month without a completed facility, Mr. Madden was demoted from his position as Zone Manager, returned to being a district sales manager, inexplicably "resigned" from American Honda on November 15, 1983, but was unemployed until after this trial ended in March, 1984, (Madden, Tr. 755, 756, 763; Braman, Tr. 431).

61. During the time Cabriolet was a Honda dealer, Cabriolet's average gross profit each month from the sale of Honda

Parts and Accessories was $15,000.00 (Davis, Tr. 389, 390; Yesner, Tr. 916).

62. American Honda's purportedly "inflexible" method of distributing vehicles which (i) was unwritten; (ii) was undisclosed to its dealers, including Cabriolet; (iii) was incapable of being fully described in the same manner by any two employees of American Honda; (iv) was easily subverted (as American Honda knew) by dealers who received inside information as to when an allocation was to take place and who registered unsold cars as sold; (v) left the distribution of more than 50,000 vehicles per year to the unchecked whim of lower management personnel; (vi) was not uniformly applied to all dealers but was used to favor certain dealers; and (vii) was used as a weapon to coerce or attempt to coerce certain dealers like Cabriolet into making extra-contractual

concessions, is not a reasonable method of distribution.

63. Commencing in the Spring of 1979, American Honda based its allocations to dealers, including Cabriolet, upon allocations established at a time of non-shortage when American Honda had no contractual right to allocate at all. (Ex. P-7; P-112).

64. By July, 1979, American Honda had decided to force Cabriolet to sell its Honda dealership. Accordingly, American Honda refused to utilize available procedures to give Cabriolet more cars because Cabriolet did not build an exclusive dealership facility. American Honda refused to decrease the minimum capital requirements, (Ex. P-7) and insisted that those minimum capital requirements, which were based upon a 264 car Planning

Volume, continue in effect. (Billmyer, Tr. 1224, 1225; Ex. P-7, Ex. P-24).

65. A representative number of Honda dealers in Miami during the 20 months of Cabriolet's tenure sold 463 more Honda cars than Cabriolet, an average of 23 per month more than the 16 sold by Cabriolet, (Yesner, Tr. 926; Ex. P-27; Bower, Tr. 552 [526 in 1979 = 43.8 per month]; Esserman, Tr. 490 [690 divided by 12 = 57.5 per month]).

66. Cabriolet, like all other Miami Honda dealers, could have sold every Honda car it would have received from American Honda during its tenure as a dealer (because it sold all 1978 inventory when the market got "hot") and through September of 1983 (a 60 month period) since the market has remained "sold out".

67. During Cabriolet's tenure as a Honda dealer, its average gross profit

per new Honda vehicle retailed was $1,038 (Yesner, Tr. 915; Ex. P-138, 139). This average gross profit was substantially lower than the $1642 average gross profit Cabriolet was earning at the end of its tenure & Yesner, Tr. 924), or of the huge profits subsequently earned by Mr. Braman, and was comparable to other Miami Honda dealers previously noted.

68. The average gross profit earned by Cabriolet on Honda parts and accessories during the time Cabriolet was a Honda dealer was $15,000 per month. (Davis, Tr. 388, 389; Yesner, Tr. 916).

69. During its tenure as a Honda dealer, Cabriolet received an average of 16 cars per month, rather than the minimum 1/12 of 264, or 22 cars per month, as provided by its planning volume. (Yesner, Tr. 919; P-7, page 3).

70. Cabriolet was a Honda dealer for twenty months. If Cabriolet was "shorted" only five Hondas per month during this twenty month period, and assuming a 12% interest rate per annum, the present value of Cabriolet's net lost profits on these one hundred cars, based on Cabriolet's actual profit experience, is $328,887. (Yesner, Tr. 921, 950, 951; Ex. P-139).

71. If Cabriolet had remained in business for sixty months, rather than twenty months, and had been "shorted" only five cars per month, and assuming a 12% interest rate per annum, the present value of its net lost profits on these three hundred cars, based on Cabriolet's actual profit experience, is $986,661. (Yesner, Tr. 923; Ex. P-139).

72. During the twenty months of Cabriolet's tenure as a Honda dealer, Cabriolet actually averaged $19,000 per

month net profit from its Honda operations (Diaz, Tr. 113).

73. If Cabriolet had remained in business for sixty months rather than twenty months, Cabriolet's Honda operations would have provided it with an additional net profit of $19,000 per month, or a total net profit of $760,000 on the basis only of 16 Honda cars per month sold, without calculating interest. (Diaz Tr. 113).

74. If Cabriolet had remained in business for sixty months and had received and sold twenty-one cars (16 actually received plus 5 "shorted"), Cabriolet's lost net profit is $1,746,661 ($760,000 + $986,661), without calculating interest. (Yesner, Tr. 923; Ex. P-139; Diaz, Tr. 113).

75. If Cabriolet had been "shorted" twenty cars per month for the twenty

months it was a dealer, a total of 400 cars, based upon its actual profit experience, and assuming 12% interest per annum, the present value of Cabriolet's net lost profits on these 400 cars is $1,315,548. (Yesner, Tr. 928; Ex. P-139).

76. If Cabriolet had been "shorted" twenty cars per month for the sixty months it should have been a dealer, a total of 1200 cars, based upon its actual profit experience, and assuming 12% interest per annum, the present value of Cabriolet's net lost profits on these 1200 cars is $3,946,645. (Yesner, Tr. 929; Ex. P-139).

77. If Cabriolet had remained in business for sixty months and had received and sold thirty-six cars per month (16 actual + 20 "shorted"), Cabriolet's lost net profit is $4,706,645. (3,946.645 plus

760,000). (Fesmer, Tr. 929, Diaz, Tr. 113; Ex. P-139).

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this action by virtue of diversity of citizenship and the amount in controversy, and because the Complaint arises under the laws of the United States, under 28 U.S.C. Section 1331 and 1332(a) and 15 U.S.C. Section 1221 et. seq. Jursdiction over the person of all parties has been admitted, and venue in this district is proper under 28 U.S.C. Section 1391(b).

2. Cabriolet is an "automobile dealer" within the meanings of 15 U.S.C. Section 1221(a) and §320.60(11)(a), Florida Statutes.

3. American Honda is an "automobile manufacturer" within the meaning of 15 U.S.C. 1221(a). Sunrise Toyota, Ltd. v.

Toyota Motor Co., 55 F.R.D. 159 (S.D., N.Y., 1972), 1972 CCH Trade Cases ¶74092; Colonial Ford, Inc. v. Ford Motor Co., 592 F.2d 1126 (10th Cir., 1979); Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir., 1979); In Re Frank Meador Buick, Inc., Bkrtcy., 13 B.R. 841 (W.D. Virginia, 1981).

4. American Honda is a "licensee" under §320.60-320.70 Florida Statutes, as a "manufacturer", importer, and distributor.

5. §320.697 Florida Statutes provides, in relevant part:

> "Civil damages. - Any person suffering pecuniary loss because of a violation by a licensee of §§320.60-320.70 notwithstanding the existence of any other remedies ... shall have a cause of action against the licensee for damages, and may recover damages therefor ... in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee ... Upon a prima facie showing by the person bringing the action that such a violation

by the licensee occurred, the burden of proof shall then be upon the licensee to prove that such violation or unfair practice did not occur." (Emphasis supplied).

6. §320.64 Florida Statutes, list the following relevant violations:

"(4) The ... licensee has indulged in any illegal act relating to his business."

"(6) The ... licensee has coerced or attempted to coerce any motor vehicle dealer to enter into any agreement with the licensee."

"(8) The ... licensee has unfairly or without due regard to the equities of a motor vehicle dealer, or without just provocation, ... failed to renew the franchise agreement of such motor vehicle dealer."

7. §320.641 Florida Statutes provides as follows:

§320.641 Unfair cancellation of franchise agreements. -

(1)(a) An applicant or licensee shall notify the motor vehicle dealer and forward a copy of such notice to the department of the licensee's intention to discontinue, cancel, or fail to renew the franchise agreement of any of its motor vehicle dealers

at least 90 days before the effective date thereof, together with the specific grounds for discontinuation, cancellation, or failure to renew of said agreement, if discontinued, canceled, or not renewed.

(b) The failure by the licensee to comply with the 90-day notice period and procedure prescribed herein shall render voidable, at the option of the motor vehicle dealer, any discontinuation, cancellation or nonrenewal of any franchise agreement. Designation of a franchise agreement at a specific location as a "nondesignated point" shall be deemed an evasion of this section and shall constitute an unfair cancellation.

(2) Franchise agreements are deemed to be continuing unless the applicant or licensee has notified the department of the discontinuation of, cancellation of, or failure to renew the agreement of any of its motor vehicle dealers, and annual renewal of the license provided for under ss. 320-60-320.70 is not necessary for any cause of action against the licensee.

(3) Any motor vehicle dealer whose franchise agreement is discontinued, canceled, or not renewed may, within such 90-day notice period, file with the department a verified complaint in triplicate for a determination of unfair discontinuation or cancellation. Agreements and certificates of appointment shall continue in effect until final determination by the department of the issues raised in such

complaint by the motor vehicle dealer, and no replacement motor vehicle dealer shall be named for this point or location to engage in business prior to the final adjudication by the department on the discontinuation, cancellation, or failure to renew.

(4) Notwithstanding any other provisions of this section, the failure of a motor vehicle dealer to be engaged in business with the public for 10 consecutive business days shall constitute abandonment by the dealer of his franchise agreement. If any motor vehicle dealer abandons his franchise agreement, he shall have no cause of action under this section. However, it shall not be considered abandonment if such failure to engage in business is due to an act of God, a work stoppage, or a delay due to a strike or labor difficulty, a freight embargo, or other cause over which the motor vehicle dealer has no control, including any violation of ss 320.60-320.70.

(5) If said complainant motor vehicle dealer prevails, he shall have a cause of action against the defendant for reasonable attorneys' fees and costs incurred by him in such proceeding for unfair discontinuation, cancellation, or failure to renew, pursuant to this section. (Emphasis supplied).

8. Having survived American Honda's Motion to Dismiss the Amended Complaint,

Cabriolet established a prima facie case, that American Honda violated Sections 320.64(4), (6), (7) and (8) and §320.641 Florida Statutes, by (a) indulging in illegal acts; (b) coercing or attempting to coerce Cabriolet to agree to build a new facility; and (c) failing to renew Cabriolet's Dealer Agreement.

9. Cabriolet also established a prima facie case that American Honda's discrimination against Cabriolet in the allocation and distribution of vehicles amounted at a minimum, to a de facto "termination" or "discontinuance" of Cabriolet's Dealer Agreement, in violation of the provisions of Chapter 320.641, Florida Statutes.

10. When Cabriolet established its prima facie case that violations of these Florida Statutes by American Honda had occurred, the burden of proof shifted to

American Honda to prove that the violations actually had not occurred. See, Section 320.697, Florida Statutes. American Honda has failed to sustain its burden of proof by a preponderance of the evidence.

11. The Court concludes as a matter of law that American Honda breached its Dealer Agreement with Cabriolet:

(a) by failing and refusing "to assist" Cabriolet in its operation relating to the resale of ... Honda Automobiles when American Honda deliberately and for its own purposes refused to deliver available Honda Automobiles to Cabriolet for resale to customers because Cabriolet did not erect separate exclusive facilities for its Honda operations (Article II, Section 1, Page 1); and

(b) by establishing an allocation rate ("rate of travel") for Cabriolet

at a time when no shortage of cars existed and when American Honda had no legal right to allocate (Article VII, Section 2, Page 10); and

(c) by then applying the said unlawfully established allocation rate to a period of shortage and refusing to modify or alter that allocation rate, thereby making American Honda's "Manner" of allocation as applied to Cabriolet "unreasonable" (Article VII, Section 2, Page 10); and

(d) by refusing to enter into "good faith negotiation to determine the extent of improvement necessary to fulfill the requirements of ... expansion of business." (Article III, Section 3, Page 3); and

(e) by implementing and refusing to modify an "unreasonable" method of

distributing automobiles to its dealers, including Cabriolet (Article VII, Section 2, Page 10); and

(f) by requiring Cabriolet to maintain excessive capital in its Honda operations (Article III, Section 7, Page 4); and

(g) by failing to deliver at least 264 cars per year to Cabriolet (Ex. P-7, Page 3).

12. American Honda breached its contract with Cabriolet in failing to perform its implied condition of cooperation when, for its own extra-contractual purposes it failed to provide vehicles (Commercial Contractors, Inc. v. U.S. Fidelity and Guaranty Co., 524 F.2d 944 (5th Cir. 1975) (implied condition of cooperation and good faith between contracting parties) when procedures were available to grant relief even under the

terms of its purported system of allocation.

13. The aforesaid breaches of the Dealer Agreement, together with a violation of the Federal Dealer Day in Court Act also constitute the "indulg-[ing]" ... by a "licensee" of an "illegal act relating to his business" in violation of §320.64(4) Florida Statutes.

14. American Honda breached an oral contract during July, 1979 with Cabriolet when it agreed to provide Cabriolet with at least 60 additional cars, required Cabriolet to purchase 60 kits of air conditioners for these cars, and failed to deliver the vehicles. In addition, this specific willful refusal to deliver cars to Cabriolet constituted an act of illegal "coercion" under the Federal Dealer's Day in Court Act.

15. American Honda unlawfully effectively "discontinued" Cabriolet's Dealer Agreement by refusing to provide available cars to Cabriolet in violation of §320.641 Florida Statutes.

16. American Honda violated Sections 320.64(7) and (8), and §320.641 Florida Statutes by failing to renew Cabriolet's Dealer Agreement upon its expiration on October 31, 1979.

17. The issue of "bad faith" under the Federal Dealer's Day in Court Act, 15 U.S.C. Section 1221 et. seq., involves a determination of American Honda's intentions as manifested by its actions. Shor-Line Rambler, Inc. v. American Motor Sales Corp., 543 F.2d 601 (7th Cir. 1976). American Honda violated both the Federal Automobile Dealer's Day in Court Act and Section 320.64(6), Florida Statutes, by unlawfully and in breach of the Dealer

Agreement demanding that Cabriolet build an unnecessary, unreasonable, expensive new dealership facility and by enforcing such unlawful demands with sanctions (no cars, non-renewal and continued high capital requirements) and the threat that such sanctions would continue; and coercing Cabriolet to sell its Honda dealership. Shor-Line Rambler, supra; Randy's Studebaker Sales, Inc. v. Nissan Motor Corp. in U.S.A., 533 F.2d 510 (10th Cir., 1976); David McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir., 1974, cert. denied 420 U.S. 992 (1975).

18. Section 320.64(6) and (7) Florida Statutes are violated by a showing that a licensee coerced or attempted to coerce a dealer to "enter into any agreement" with the licensee. That the coercion did not succeed, therefore, does not obviate the

attempt, or the violation of the law. American Honda attempted to coerce Cabriolet to build a new exclusive facility for Honda Operations in consideration for which construction American Honda would increase Cabriolet's allocation. Any characterization of American Honda's actions as merely a "request" rather than coercion is negated by the sanctions applied, to wit, refusal to provide more cars when the purported "system" of distribution contained available procedures to provide vehicles, by knowingly allowing other dealers to subvert the "system", by failing to provide vehicles even when, at the inducement and promise of American Honda's representatives, Cabriolet purchased air conditioners, and by favoring other dealers.

19. Cabriolet would not have sold its Honda operations but for the relentless, unlawful pressure, i.e. coercion, of American Honda that Cabriolet build a new, exclusive Honda facility, and the sanctions (refusal to provide cars) employed.

20. It is reasonable to conclude in view of §320.641, Florida Statutes, that Cabriolet would have remained a Honda dealer for at least five years, and that Cabriolet could have operated at least as well during a continuously "hot" period as its Miami competitors.

21. Lost profits for five years is a reasonable measure of damages, in this case especially since damages need not be ascertainable with an absolute degree of certainty and since American Honda is estopped to use its actions (establishing an illegal and low allocation and coercing

Cabriolet to sell its dealership) to minimize the damages.

22. Cabriolet's unrebutted testimony on damages it has suffered was not unreasonable as a matter of law in light of the profits testified to by other dealers and the evidence of Cabriolet's actual profit history.

23. Cabriolet also is entitled to an award of attorneys' fees herein pursuant to the Federal Automobile Dealer's Day in Court Act, and 320.697 Florida Statutes.

24. Assuming a method of American Honda's allocation and distribution existed between September 1978 and March 1980, such method was unlawful both per se and as applied to Cabriolet, and was used as an implement of unlawful coercion in violation of the Federal Dealer's Day in Court Act and Florida Statutes 320.60-320.70.

25. As a direct and proximate result of Honda's breaches of contract, and breaches and violations of each of the statutes referenced above, Cabriolet has suffered damages in the amount of $4,706,645.00.

26. The Court will convene a Hearing at the earliest practical time to ascertain the amount of attorneys fees and costs to be added to the judgment referenced above.

Any findings of fact which should properly be deemed conclusions of law are hereby adopted as such.

DONE AND ORDERED in Chambers this 5th day of July, 1984.

/s/
ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

Paul Marcus, Esquire
Michael Rosenberg, Esquire
Bennett Falk, Esquire
Roland N. Smoot, Esquire
J. Donald McCarthy, Esquire
Stanley J. Krieger, Esquire

UNITED STATES COURT OF APPEALS
for the Eleventh Circuit

No. 84-5698

D.C. Docket No. 79-3409

CABRIOLET PORSCHE AUDI, INC.,
A FLORIDA CORPORATION d/b/a
CABRIOLET HONDA CAR,
Plaintiff-Appellee,
Cross-Appellant,

versus

AMERICAN HONDA MOTOR CO., INC.,
A CALIFORNIA CORPORATION,
Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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Before HILL and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

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*Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Entered: October 15, 1985
For the Court: Spencer D. Mercer, Clerk
By: /s/ _____
Deputy Clerk

ISSUED AS MANDATE: Nov. 6, 1985

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that plaintiff-appellee/cross-appellant pay to defendant-appellant/cross-appellee, the costs on appeal to be taxed by the Clerk of this Court.

UNITED STATES DISTRICT COURT
for the
Southern District of Florida

Case No. 79-3409-CIV-ALH

ORDER REDESIGNATING FINAL JUDGMENT AND AMENDED FINAL FACT AND CONCLUSIONS OF LAW AND AMENDED FINDINGS OF ACT AND CONCLUSIONS OF LAW

Filed 7-31-84

CABRIOLET PORSCHE AUDI, INC.,
a Florida corporation, d/b/a
Cabriolet Honda Car,
Plaintiff,
vs.

AMERICAN HONDA MOTOR CO., INC.,
a California corporation,
Defendant.

THIS COURT has made an independent review of the record in this cause and, pursuant to Rule 60 (a) of the Federal Rules of Civil Procedure, it is hereby,

ORDERED AND ADJUDGED, that the Final Judgment dated June 18, 1984 and the Amended Final Judgment dated July 5, 1984, are redesignated as the Findings of Fact

and Conclusions of Law and Amended Findings of Fact and Conclusions of Law, respectively.

DONE AND ORDERED, this 20 day of July 1984, at Miami, Florida.

Copies to:
Paul Marcus, Esq.
Michael Rosenberg, Esq.
Bennett Falk, Esq.
Roland N. Smoot, Esq.
J. Donald McCarthy, Esq.
Stanley J. Krieger, Esq.

/s/
ALCEE L. HASTINGS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
for the
Southern District of Florida

Case No. 79-3409-CIV-ALH

FINAL JUDGMENT
Filed 7-31-84
Robert M. March
Clerk
U.S. Dist. Court
S.D.of Fla.Miami

CABRIOLET PORSCHE AUDI, INC.,
a Florida corporation, d/b/a/
Cabriolet Honda Car,
Plaintiff,

vs.

AMERICAN HONDA MOTOR CO., INC.,
a California corporation
Defendant.

THIS CAUSE came on for non-jury trial on the 12th day of March, 1984 and, based upon the Amended Findings of Fact and Conclusions of Law as determined by the Court, it is

ORDERED, ADJUDGED, AND DECREED, THAT:

1. Plaintiff, CABRIOLET PORSCHE AUDI, INC., a Florida corporation, d/b/a Cabriolet Honda Car, shall have and recover of

and from the Defendant, AMERICAN HONDA MOTOR CO., INC., a California corporation, the sum of $4,706,645.00, for which sum let execution issue.

2. This Court expressly reserves jurisdiction for the purposes of taxing attorneys fees and costs herein.

DONE AND ORDERED, at Miami, Florida this 20 day of July, 1984.

Copies to:
Paul Marcus, Esq.
Michael Rosenberg, Esq.
Bennett Falk, Esq.
Roland N. Smoot, Esq.
J. Donald McCarthy, Esq.
Stanley J. Krieger, Esq.

/s/_____
ALCEE L. HASTINGS
UNITED STATES
DISTRICT JUDGE

STATUTORY PROVISIONS

Title 15. United States Code

Chapter 27. Automobile Dealer Suits Against Manufacturers

Sec.
1221. Definitions.
1222. Authorization of suits against manufacturers; amount of recovery; defenses.
1223. Limitations.
1224. Antitrust laws as affected.
1225. State laws as affected.

§ 1221. Definitions

As used in this chapter--

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and

any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

(Aug. 8, 1956, c. 1038, § 1, 70 Stat.1125.)

§ 1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the

United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. (Aug. 8, 1956, c. 1038, § 2, 70 Stat. 1125.)

* * *

§ 1223. Limitations

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued.

(Aug. 8, 1956, c. 1038, § 3, 70 Stat. 1125.)

§ 1224. Antitrust laws as affected

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

(Aug. 8, 1956, c. 1038, § 4, 70 Stat. 1125.)

§ 1225. State laws as affected

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled.

(Aug. 8, 1956, c. 1038, § 5, 70 Stat. 1126.)

Rules of Civil Procedure

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact [whether based on oral or documentary evidence]* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be

considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

*Bracketed portion added by amendment effective August 1, 1985.